

# ESSAY

## COMMON LAW CONSTITUTIONALISM AND THE LIMITS OF REASON

*Adrian Vermeule\**

*A central claim of common law constitutionalism has been that precedent and tradition embody some form of latent wisdom. On this view, judges will generally do best by deferring to the wisdom embodied in precedent and tradition, rather than trusting their unaided reason. This Essay offers a critical analysis of the mechanisms that are said to generate this latent wisdom. The relevant claims and mechanisms suffer from infirmities of internal logic and from a failure to make institutional comparisons between and among precedent and tradition, on the one hand, and the outputs of legislatures, executive officials, and constitutional framers on the other. Statutes, administrative decisions, and constitutional texts also embody information and are also the product of many minds. Arguments for the rationality or efficiency of the ordinary common law, or of societal traditions, do not translate successfully into arguments for the comparative rationality or efficiency of the constitutional common law, as compared to statutes and other sources of law.*

### INTRODUCTION

Common law constitutionalism is a theory, or rather a family of theories, about constitutional adjudication. The family includes the idea that courts do and should develop the meaning of general or ambiguous constitutional texts by reference to tradition and precedent, rather than original understanding, and the related idea that courts do and should proceed in a Burkean, rather than ambitiously rationalist or innovative fashion. In recent years, the central and most striking claim of common law constitutionalism has been that precedent and tradition embody some form of latent wisdom. Judges will generally do best by deferring to the wisdom embodied in precedent and tradition, rather than trusting their unaided reason, or so the general claim runs.

In what follows, I offer a critical analysis of the mechanisms that are said to generate this latent wisdom. Drawing throughout on Jeremy Bentham's critique of the subconstitutional common law, I attempt to update Bentham by using the tools of modern social science and by adapting his claims to the setting of constitutional law. My conclusions, however, remain largely Benthamite in spirit: The constitutional com-

---

\* Professor of Law, Harvard Law School. Thanks to Adam Cox, Anuj Desai, Jack Goldsmith, Daryl Levinson, Frank Michelman, Cass Sunstein, and Todd Zywicki for helpful comments and conversations, and to Dan Klaff and Andrea Paul for helpful research assistance.

mon law is not plausibly seen as a repository of latent wisdom. The relevant claims and mechanisms suffer from infirmities of internal logic and from a failure to make institutional comparisons between and among precedent and tradition, on the one hand, and the outputs of legislatures, executive officials, and constitutional framers on the other.

The idea most frequently invoked to connect common law constitutionalism and the limits of reason is Burke's dictum:

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them.<sup>1</sup>

Burke's dictum is a claim about ordinary common law, not constitutional common law; Burke celebrated a common law system that did not include judicial review.<sup>2</sup> But common law constitutionalists, invoking Burkean themes, have transposed these mechanisms to the setting of constitutional adjudication, emphasizing the immanent rationality and evolutionary or adaptive fitness of constitutional precedents and traditions. As we shall see, these ideas can be interpreted either in informational terms, through the lens of the Condorcet Jury Theorem, or in evolutionary terms, by reference to models in which common law processes evolve toward efficiency.

In either case, however, I will suggest a range of puzzles and problems that limit the mechanisms' operation to a narrow set of conditions and that even more sharply limit their relevance to constitutional law and theory. The rash of scholarship that portrayed Arrow's Theorem as a revolutionary contribution to legal theory (albeit not intended as such) has abated, in part because it has become apparent that the Theorem's conditions are highly restrictive.<sup>3</sup> I suggest that the same skepticism is warranted here. Common law constitutionalism may or may not be justifiable or superior to its competitors on other grounds, but the informational and evolutionary mechanisms recently invoked to depict it as a repository of latent wisdom turn out to be intrinsically fragile and institutionally ungrounded.

1. Edmund Burke, *Reflections on the Revolution in France* 74 (Frank Turner ed., Yale Univ. Press 2003) (1790).

2. At least not in anything like its current form. See generally Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 *Colum. L. Rev.* 2091, 2137–46 (1994) (describing 1702 opinion that concluded that acts of Parliament were not subject to judicial review but acts of corporate bodies that did not exercise power of sovereignty can be).

3. See Gerry Mackie, *Democracy Defended* 72–157 (Ian Shapiro ed., 2003). For responses, see Don Herzog, *Dragonslaying*, 72 *U. Chi. L. Rev.* 757, 769–74 (2005); Saul Levmore, *Public Choice Defended*, 72 *U. Chi. L. Rev.* 777, 782 (2005).

The central theme in the following critique is this: Arguments for the rationality or efficiency of the ordinary common law, or of societal traditions, do not translate successfully into arguments for the rationality or efficiency of the *constitutional* common law, especially as compared to statutes and other sources of law. The institutional context of constitutional adjudication is decisively different than that of ordinary common law adjudication. Both the epistemic and evolutionary mechanisms at most suggest that a single judge can do better by deferring to the collective wisdom embodied in the decisions of past judges, or in larger societal traditions, rather than by relying on her unaided reason. Perhaps this is sometimes the situation faced by judges in the shrinking domain of ordinary common law cases where there is no statute or administrative regulation in the picture. Yet this is almost never the situation that judges face in constitutional adjudication. The alternative to relying on precedent or tradition, in constitutional law, is never reliance on the unaided reason of the single judge; the alternative is reliance on the latent wisdom of collective legislatures, or of the executive branch, or of a group of constitutional framers. In different contexts, each of these sources has distinctive costs and benefits. However, the relevant institutional comparisons are much different than, and more complex than, the simple comparison of unaided reason to collective wisdom emphasized by Burke.

The discussion is structured as follows. Part I discusses *Burke as Condorcet*—the idea that Burke’s dictum can be interpreted epistemically, in light of the information-aggregating models developed under the umbrella of the Condorcet Jury Theorem. I suggest that the Jury Theorem has no clear payoff for constitutional adjudication. The Theorem’s rather stringent conditions will frequently be violated by the precedents or societal traditions that common law constitutionalists would draw upon. Most importantly, justifying common law constitutionalism on the basis of the Jury Theorem is fatally noncomparative. Statutes, administrative decisions, and constitutional texts also embody information and are also the product of many minds. In a range of cases, those sources will often be superior to precedents and societal traditions, according to the Jury Theorem’s own criteria and logic. Indeed, the epistemic interpretation of Burke leads most directly to James Bradley Thayer—to deference to legislatures in constitutional adjudication.

Part II discusses *Burke as Darwin*—the idea that Burke’s dictum can be interpreted in light of evolutionary models in which the common law converges to efficiency. I suggest that these models, like the Jury Theorem, have no obvious payoff for constitutional adjudication. Even if efficiency or adaptive fitness is a desirable property of the ordinary common law, it is a problematic normative goal for constitutional law. In any event, the mechanisms of common law evolution have no clear counterpart in constitutional law. The central evolutionary mechanism in common law theory—that the selection effects of litigation cause inefficient rules to be weeded out over time—is of dubious relevance to constitu-

tional law, where litigation is infrequent and stakes are chronically distributed in an unequal way across organized and unorganized interests. Most important is that even if the constitutional common law is constantly converging to efficiency, the background environment is changing as well, which means that constitutional precedent may or may not be efficient at any given time. If the political environment changes with sufficient rapidity, constitutional common law will face a moving target, and will not have enough time to converge to or even close to efficiency.

For that reason lawmaking through alternative procedures, such as legislation, will often prove at least as efficient as precedent. Even if constitutional law is constantly converging toward the optimum, legislation may be closer to the optimum at any given point in time, given a changing environment. Here too, the crucial institutional comparison is between legislative constitutionalism and common law constitutionalism. There is no general reason to think that the evolutionary capacity of common law constitutionalism is systematically superior to that of legislative constitutionalism. Even if the efficiency thesis is useful in the ordinary subconstitutional context of common law adjudication, its utility is obscure in the very different setting of constitutional law.

Throughout, I pursue a twofold strategy, both identifying internal problems with the optimistic accounts of the common law that I canvass, and then proceeding to examine whether those accounts, even if correct, can be transposed to the institutional setting of constitutional adjudication. In each case, the internal critique is a necessary preliminary to the constitutional discussion; the mechanisms of common law constitutionalism that I discuss cannot be understood in the abstract, without reference to the common law context from which they arose. However, I take no position on whether these mechanisms offer successful accounts of the ordinary common law. My central claim is that even if they do, no transposition to the constitutional setting is possible.

All in all, the idea that common law constitutionalism is a repository of latent wisdom, and enables judges to cope with the limits of human reason, finds little support in informational or evolutionary mechanisms. This does not touch arguments that justify common law constitutionalism on other grounds,<sup>4</sup> nor does it speak to other debates over constitutional adjudication. It does, however, remove a main strut of recent arguments for common law constitutionalism.

### I. BURKE AS CONDORCET

This Part explains, and questions, the informational version of common law constitutionalism. Part I.A outlines some basics of the Burkean

---

4. For example, on the basis of the value of stability and protecting settled expectations. For an overview of the arguments, see Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 *Harv. J.L. & Pub. Pol'y* 219, 225–26 (1997) [hereinafter Merrill, *Public Choice*].

approach to constitutional adjudication and details a Condorcetian interpretation of Burke's dictum as a mechanism for aggregating information: The decisions of a line of past judges embody aggregated information that is superior to the unaided reason of any single judge or small group of judges sitting today. Part I.B analyzes a series of problems arising from the internal logic of this interpretation, suggesting that the Condorcet Jury Theorem's conditions are too restrictive for the interpretation to be convincing. Part I.C turns to comparative institutional problems. The idea that decisions of a line of past judges are better than the decisions of a single judge today has little relevance for constitutional adjudication. There the question is not whether judges should be guided by their unaided reason; it is whether they should defer to past judges *rather than* the views of constitutional framers or current legislative and executive institutions. In that comparison, the Condorcetian logic suggests that in many cases, precedent is not the best source of information.

### A. *Burkean Basics*

1. *Burke, Tradition, and Precedent.* — Common law constitutionalism represents an explicitly Burkean strain in constitutional theory.<sup>5</sup> The basic commitment of Burkean theorists is to tradition, somehow understood. For some, tradition has intrinsic worth, and adherence to tradition is intrinsically admirable or at least inevitable. On this view, tradition is constitutive of our very identities.<sup>6</sup> To break with tradition threatens a kind of cultural suicide, and in any event is necessarily ineffective, because tradition will continue to shape the very attempt to break with it.

---

5. See Thomas W. Merrill, *Bork v. Burke*, 19 Harv. J.L. & Pub. Pol'y 509, 511–13 (1996) [hereinafter Merrill, *Bork v. Burke*] (defending “conventionalism” and claiming that it has Burkean roots); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 893 (1996) [hereinafter Strauss, *Common Law Interpretation*] (“[I]deas . . . commonly associated with Burke . . . are . . . the underpinnings of the common law approach to precedent.”); Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006) [hereinafter Sunstein, *Burkean Minimalism*] (describing Burkean approach to constitutional interpretation); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619 (1994) (same). Common law constitutionalism is also compatible with Friedrich Hayek's claim that the common law, analogously to markets, embodies dispersed or decentralized information that is superior in the aggregate to the information of any of its participants. 1 Friedrich A. Hayek, *Law, Legislation and Liberty: Rules and Order* 15–16 (1973). That claim fits naturally with a Condorcetian interpretation: As I will explain shortly, the Jury Theorem relies on dispersed information for its aggregative effects, and describes conditions under which the information held by the voting or statistical group will be superior to that held by any of the group's members. However, although there is little difference between the Burkean and Hayekian strains as regards any of the claims relevant here, in constitutional theory the self-conception of the central theorists is Burkean, not Hayekian. Accordingly, I focus on Burke's dictum rather than its Hayekian relatives.

6. Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 217 (1993) (“The constrained creativity of the experienced lawyer . . . comes only with time and experience, and hence with age, and thus constitutes a species of wisdom that the young and inexperienced cannot possess.”).

For other Burkeans, however, tradition has instrumental or derivative value.<sup>7</sup> Tradition can be and has been defended on a variety of instrumental grounds, including the value of small-scale incremental change as opposed to sudden large-scale change, and the related idea that institutions evolving incrementally over time are more likely to be optimal than designed institutions. I examine such claims in Part II. This section addresses the epistemic argument for tradition: the argument that following traditions is the best response to the limits of human rationality, cognitive capacity, and information. In one sense, this is a limited inquiry, but the epistemic argument for Burkeanism is enduring and central; it unites many disparate strands of Burkeanism in a common distaste for “theorizing,” “unaided reason,” “rationalism,” and “innovation.”

Against this background, I focus on the epistemic justification for Burkean adjudication. Burkeans who apply their views to adjudication tend to assimilate precedent and tradition; they see common law constitutionalism as a kind of judicial tradition unfolding over time, one that draws on larger social and political traditions as well. To be sure, in some cases, or at some times, common law constitutionalists distinguish precedent from tradition. As we will see, however, there is also a standing temptation to let the distinction erode.<sup>8</sup>

The slippage from tradition to precedent and back again is a material ambiguity, indeed a crucial one. Arguments that find latent wisdom in tradition may not translate successfully to precedent even if precedent is understood as judicial tradition. My focus is on precedent, not on tradition per se, but one of my points is that common law constitutionalism offers similar rationales for incorporating both into constitutional adjudication, and not infrequently equivocates between the two. Accordingly, I will generally refer (with some awkwardness) to “precedent or tradition,” but will distinguish the two when the analysis warrants.

2. *Burkeanism and Second-Order Rationality.* — By a kind of mental commitment, the Burkean judge suspends his or her own first-order reason about the merits of individual policies, in order to follow a simpler second-order rule of thumb: Policies that comport with the stream of precedent or tradition, somehow defined, are permissible, at least presumptively; policies that do not are not permissible, or at least are suspect. The consequentialist argument for this decision procedure is that over an array of future cases, the Burkean judge believes she will do better by following precedent or tradition than by following her unaided reason. The Burkean approach is thus a kind of second-order rationalism that distrusts first-order rationalism, in which judges deciding particu-

---

7. See, e.g., Merrill, *Bork v. Burke*, supra note 5, at 515 (proposing that choice between originalism and Burkean “conventionalism” should be evaluated by asking which approach is most likely to further a series of “values that conservatives commonly embrace”).

8. See infra notes 24–29 and accompanying text.

lar cases attempt, on a blank slate, to figure out for themselves what is best.<sup>9</sup>

The shape of this argument suggests four main questions. First, is this sort of mental commitment feasible, or psychologically possible? Second, what is the criterion for “doing better”—what is the first-best that the Burkean second-order approach hopes to track, over an array of cases? Third, why is precedent the right second-order guidepost, as opposed to, say, the findings of law and economics, the platform of the Republican Party, or the teachings of Zoroaster? Finally, what are the implications of the Burkean approach for constitutional adjudication? I take up the last question in detail in Parts I.B and I.C. Here I offer some brief remarks on the first three questions.

The mental commitment to a second-order rule—in this case, following precedent or tradition—may seem psychologically mysterious. Suppose a case where, to the decisionmaker’s unaided reason, the correct result seems clearly to be X, whereas precedent or tradition clearly says Y; will not the second-order commitment break down? However, common law constitutionalists implicitly assume that such mental commitments are stable, although the psychological mechanisms that support them are as yet poorly understood; I will follow that assumption in order to engage the internal logic of the common law constitutionalists’ view.

Moreover, there are two nuances that dilute the force of the problem in any event. First, Burkean judges use precedent or tradition not only to avoid error but to conserve on the costs of decisionmaking.<sup>10</sup> If so, then the Burkean judge will not (re)decide the first-order question and will not form an independent view that X is the case; no tension will arise. As we will see, however, while this nuance helps to sidestep the problems with second-order decisionmaking, it actually undercuts the Burkean assumption that precedent or tradition contains latent wisdom, because it means that most precedents or traditions do not embody any independent judgment about the merits. I take up this crucial point in Part I.B.

Second, some theorists envision Burkean adjudication not as an iron-clad commitment, but as a presumption or a rule with exceptions, and thus as defeasible in particular cases where the Burkean judge’s first-order views or judgments are particularly strong. “[A] rationalistic account of traditionalism just establishes a requirement that one give the benefit of the doubt to past practices. If one is quite confident that a practice is wrong . . . this conception of traditionalism permits the practice to be eroded or even discarded.”<sup>11</sup> Because beliefs have a dimension of intensity, or the epistemic confidence the decisionmaker attaches to them, the Burkean can reconcile his first-order and second-order beliefs by saying

---

9. See, e.g., Strauss, *Common Law Interpretation*, *supra* note 5, at 892–94 (discussing “the common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up”).

10. See *id.* at 912.

11. *Id.* at 895.

that the latter will prevail only if the former do not exceed some threshold of intensity.

A more troublesome question about the second-order interpretation of Burkeanism is: What exactly is the first-order good that following precedent or tradition promotes? If precedent or tradition is of derivative value, as an epistemic aid, of what value is it derivative? But it is wrong to assume that there must be some *single* first-level answer. If Burkeanism is a second-order epistemic strategy, it can be used by decisionmakers with differing first-order commitments.<sup>12</sup> Burkeans with various first-order theories about what makes outcomes good, or valuable, or just, can converge on the second-order value of precedent or tradition, without settling their theoretical differences. It is perfectly coherent, whether or not correct, for a judge who believes that maximizing “welfare” (somehow understood) is the touchstone of good decisions *and* a judge who believes that respecting “justice” (somehow understood) is the touchstone of good decisions to agree on the second-order epistemic value of precedent or tradition as a guide to implementing their very different first-order values.

The most basic question in such cases, however, is why the second-order guidepost should be precedent or tradition, rather than something else. For Burkeans, one prominent answer is that following precedent and tradition best comports with the limits of human reason; precedent and tradition embody the contributions of many minds<sup>13</sup> in the past, in contrast to the unaided reason of an individual decisionmaker today.<sup>14</sup> Again, the many minds might be conceived as expressing views about welfare, or justice, or anything else; the basic idea that more heads are better than one or a few will remain unaffected. Crucially, however, the insight about many minds can be given either an informational or an evolutionary interpretation. Here I will address only the former, leaving the latter to Part II.

---

12. Cf. Cass R. Sunstein, Commentary, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733, 1740–41 (1995) (arguing that participants in legal controversy may agree on results and low-level explanations, but need not agree on fundamental principles).

13. The phrase “many minds” is taken from Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (2006).

14. See Merrill, *Bork v. Burke*, supra note 5, at 519–21 (emphasizing that judicial “conventionalism” comports with “skeptical[ism] about the powers of human reason”); Strauss, *Common Law Interpretation*, supra note 5, at 891–92 (noting that “central traditionalist idea” is caution about rejecting judgments of people “acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time” and that “[j]udgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations”); Sunstein, *Burkean Minimalism*, supra note 5, at 369 (articulating Burkean theory of judicial decisionmaking and suggesting that “Burke opposes theories and abstractions, developed by individual minds, to traditions, built up by many minds over long periods”); Young, supra note 5, at 644–47 (offering Burkean account of limits of human reason).

3. *Precedent, Tradition, and the Jury Theorem.* — The Condorcet Jury Theorem provides the most obvious framework for an informational interpretation of Burke's dictum, and it is the only well-specified framework that appears in the literature on common law constitutionalism. Although in principle informational approaches need not draw upon the Jury Theorem, which is just one epistemic model, common law constitutionalists either invoke the Theorem to put structure into their claims or else remain vague about the informational mechanisms they have in mind.<sup>15</sup> I will therefore focus on the Jury Theorem, without claiming that it is the only informational or epistemic account that could be offered.

The Jury Theorem explains why large groups might do better than small groups at solving problems with exogenously defined right answers.<sup>16</sup> In its simplest form, the Jury Theorem states that, where there is a binary choice and a right answer exists, and where average competence exceeds .5—that is, the average member of the group is more likely than not to choose correctly—then the likelihood that a majority vote of the group will produce the right answer approaches certainty as the group becomes larger or as average competence increases.<sup>17</sup> Thus, the group's average competence can quickly become higher than the competence even of an expert individual.

The Theorem can be extended to cover more than two choices,<sup>18</sup> and even to cover cases where there is no right answer exogenous to the preferences of some defined group, such as the population at large.<sup>19</sup> The latter point implies that the Theorem need not be understood as addressing the aggregation of dispersed information, but it certainly can be interpreted to do so, and usually is. In any event, the Condorcetian interpretation of Burke rests on this informational interpretation of Condorcet. The crucial point, amid these complexities, is just that the aggregate decisionmaking competence of many minds will almost cer-

---

15. For the Condorcetian interpretation of Burke, see Sunstein, *Burkean Minimalism*, supra note 5, at 370–71. Something like the Condorcetian interpretation is plausibly implicit in the other accounts cited in note 5, supra, but those discussions are vague about their epistemic assumptions.

16. See generally James Surowiecki, *The Wisdom of Crowds* 176 (2004) (noting that “small groups can make very bad decisions, because influence is more direct and immediate and small-group judgments tend to be more volatile and extreme”).

17. See Marquis de Condorcet, *An Essay on the Application of Mathematics to the Theory of Decision Making* (1785), reprinted in *Condorcet: Selected Writings* 33, 48–49 (K. Baker ed., Bobbs-Merrill 1976) [hereinafter *Condorcet, Application of Mathematics*].

18. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 *J. Pol. Phil.* 277 (2001).

19. This is the “polling model” interpretation of the Jury Theorem. See Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in *Information Pooling and Group Decision Making* 173 (Bernard Grofman & Guillermo Owen eds., 1986); Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J. Legal Stud.* 327, 332–33 (2002).

tainly exceed the competence even of the group's wisest members, if the average member is more likely than not to vote correctly.

How exactly does the Jury Theorem relate to Burkean traditionalism? On this view, traditions—including judicial traditions or lines of precedents—are seen as a series of “votes” that aggregate to a collective view. That view contains a kind of latent wisdom, in that the collective view is under certain conditions much more likely to be correct than the view of any individual. “If countless people have committed themselves to certain practices [over time], then it is indeed possible, on Condorcetian grounds, that ‘latent wisdom’ will ‘prevail in them,’ at least if most of the relevant people are more likely to be right than wrong.”<sup>20</sup>

On this account, the people who participate in a tradition or the judges who participate in developing a line of precedent lived at different times, and thus never participated in an actual collective vote. The Jury Theorem does not literally require that the decisionmaking group ever take a collective vote under majority rule; exactly the same aggregative properties can be obtained just by taking the statistical mean of guesses from within some population of guessers. As the number of participants becomes large, the median vote (which prevails under majority rule) will converge toward the statistical mean of guesses within the group. Later I will question whether this account succeeds, but for now I take it as given.

I will also put aside the standard question whether there are indeed exogenously defined right answers in law generally or constitutional law in particular. Jurisprudential controversies abound here, between those who argue that there are right answers even in hard cases,<sup>21</sup> those who deny this,<sup>22</sup> and those who think that the existence of right answers is irrelevant, because of persistent disagreement over what the right answers are.<sup>23</sup> The Jury Theorem (in its informational interpretation) requires only an exogenous right answer, and thus gets purchase on any case or legal problem where one of the following conditions are met: (1) there is a factual component to the legal question; (2) there is a prescriptive or means-end judgment about which legal ruling will best conduce to achieving an agreed-upon goal; (3) the legal question, although neither factual nor prescriptive, otherwise has a right answer somehow defined. Few will deny that many cases fit one of these categories. Even those who deny that all legal cases have right answers rarely deny that some cases do.

Those who are skeptical of the right-answer thesis, in any of these senses, put themselves outside the informational framework altogether. By contrast, common law constitutionalists who interpret Burke in episte-

20. Sunstein, *Burkean Minimalism*, *supra* note 5, at 371.

21. See Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057 (1976).

22. For an overview of different versions of the basic thesis that law is indeterminate, at least in some cases, see Lawrence B. Solum, *Indeterminacy*, in *A Companion to Philosophy of Law and Legal Theory* 488 (Dennis Patterson ed., 1999).

23. Cf. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *Natural Law Theory: Contemporary Essays* 158 (Robert George ed., 1992).

mic terms necessarily assume the existence of right answers, suitably defined, in at least some constitutional domain. In order to examine the internal logic of the argument, I will follow that assumption.

### B. *Burke as Condorcet: Internal Problems*

Nonetheless, there remain serious obstacles to any Condorcetian interpretation of Burke, both in general and as applied to judicial precedent in particular. I begin with the internal logic of the interpretation, before moving to comparative institutional problems.

1. *Precedent, Tradition, and Numbers.* — As mentioned above, a central ambiguity within common law constitutionalism is the slippage back and forth between judicial traditions—lines of precedent or doctrine—on the one hand, and broader societal traditions on the other. In principle, a precedent need not draw upon tradition, and a tradition need not be embodied in a precedent. Sometimes common law constitutionalists explicitly distinguish precedent from tradition.<sup>24</sup> Some proponents of tradition, especially those who see tradition as a kind of spontaneous order, explicitly deny that praise for tradition implies praise for precedent, which they see as the positive lawmaking of a centralized lawmaker (such as the Supreme Court).<sup>25</sup>

However, the lines frequently blur, both in theory and in practice. In theory, a main claim of common law constitutionalism is that a stream of precedent that has stood the test of time is a kind of tradition, and deserves respect for the same reasons as tradition.<sup>26</sup> In practice, it has been argued, for example, that the Warren Court was a “common law court,” basing its decisions on experience.<sup>27</sup> In some cases, this claim is supported by pointing to earlier precedents on which the Warren Court drew.<sup>28</sup> Where the Warren Court overruled or broke dramatically from precedent, however, the claim is supported by pointing to larger political and social traditions said to be inconsistent with the discarded precedent. Thus, for example, the innovative decisions requiring a “one person, one

---

24. See David A. Strauss, Tradition, Precedent and Justice Scalia, 12 *Cardozo L. Rev.* 1699, 1706 (1991) (“Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago.”).

25. See A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation, 77 *N.C. L. Rev.* 409, 489–93 (1999).

26. See, e.g., Strauss, *Common Law Interpretation*, supra note 5, at 892 (“Because, in this view of traditionalism, the age of a practice alone does not warrant its value, relatively new practices that have slowly evolved over time from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time.”).

27. David A. Strauss, *The Common Law Genius of the Warren Court* 5–6 (Univ. of Chi. Pub. Law & Legal Theory Research Paper Series, Paper No. 25, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=315682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=315682) (on file with the *Columbia Law Review*) [hereinafter Strauss, *Common Law Genius*] (suggesting that “[i]t is unwise to try to resolve a problem without deferring, to some degree, to the collected wisdom reflected in what others have done when faced with a similar problem in the past”).

28. See *id.* at 17–24.

vote” standard in reapportionment cases are justified by pointing to a broader historical trend toward expansion of the formal franchise.<sup>29</sup> Common law constitutionalism that ranges over both precedent and tradition has multiple degrees of freedom.

This ambiguity is often material, because the Condorcetian credentials of precedent may be much different than those of broader traditions. In the case of Supreme Court precedents, for example, only 110 Justices have ever sat on the Court, and of those only a fraction have been participants in any given line of precedent. For a Condorcetian analysis, numbers are critical. When the individual reason of a lone judge or small group of judges is compared with traditions embodying (let us suppose) thousands or even millions of individual judgments, the superiority of collective wisdom is palpable. When the judgments of a group of nine Justices, today, are compared with the judgments of (say) twenty Justices yesterday, the margin of superiority thins. Moreover, by the Theorem’s terms, group competence is a function not only of numbers, but of average competence—the probability of selecting the correct answer. If today’s Justices are more competent than yesterday’s, the difference may swamp a small deficit in numbers. Shortly, I will give reasons to think that average competence indeed rises over time.

Of course, even if that is true, the relative numbers of yesterday’s Justices may swamp the higher competence of today’s Justices; everything depends on the particular values of the variables, as is always true with the Jury Theorem. The overall point remains, however. Precedent, especially at the level of the Supreme Court, has a very different Condorcetian status than large-scale political and social traditions. Assimilating the two or vacillating between them, as often happens in common law constitutionalism, gives precedent an unwarranted sheen. To the extent that the informational interpretation of Burke is focused on judicial traditions—the precedents developed within courts, as opposed to broader social and political traditions—its Condorcetian credentials are especially suspect.

2. *Time and Information.* — There is a systematic reason for thinking that today’s Justices are of higher average competence than yesterday’s, all else equal: Today’s Justices know more, just because they live today, not yesterday. Bentham, following Pascal, offered a crucial objection to Burkean traditionalism: Decisionmakers today have more information than decisionmakers in the past, because they enjoy the benefit of seeing how things actually turned out after the first round of decisions.<sup>30</sup> The ancients are not older than we are, and therefore more wise; they are younger than we are, and therefore less wise, because they lack whatever

---

29. *Id.* at 31–32.

30. See Jeremy Bentham, *Bentham’s Handbook of Political Fallacies* 54–56 (Harold A. Larrabee ed., 1952) (1824) [hereinafter *Bentham, Handbook*]; Blaise Pascal, *Preface to the Treatise on Vacuum*, in *Thoughts, Letters, and Minor Works* 444, 449 (Charles W. Eliot ed., M.L. Booth et al. trans., 1910).

knowledge we have gained in the succeeding years. Experience in this sense favors the moderns over the ancients.

3. *Common Questions?* — A fundamental assumption of the Jury Theorem, where the aggregation of dispersed information is concerned,<sup>31</sup> is that voters or group members must be addressing the same question.<sup>32</sup> If A makes a judgment about question X and B makes a judgment about question Y, there is no genuine pooling of collective wisdom. Suppose that X and Y superficially resemble each other, but are critically different on closer inspection. Then it may be easy to mistake an ersatz agreement among many minds, which looks as though it rests on collective wisdom but really does not, for a genuinely Condorcetian process.

This ersatz collective wisdom is, plausibly, the ordinary state of judicial precedents extended over time.<sup>33</sup> Suppose that at Time 1 the Justices of the Supreme Court hold that a state may not constitutionally ban flag burning<sup>34</sup> or partial-birth abortion.<sup>35</sup> Then suppose that Congress enacts a similar statute,<sup>36</sup> and the constitutionality of that statute arises at Time 2. Does the collective judicial judgment at Time 1 contain information useful at Time 2, from a Condorcetian perspective? What questions exactly are the Justices addressing in the two cases? It is not obvious that the considerations are the same. Holmes, among others, thought that the problem of judicial review was very different for federal and state governments;<sup>37</sup> and as I shall emphasize shortly, the Time 2 decision poses a different question just because it is not a case of first impression. None of these points turn on whether the Time 1 decision was correct or not, or on what the Time 2 decision should be. The point is that they are not the same decisions.

31. This point does not hold for the polling interpretation, which we have put aside (because it is not the interpretation on which common law constitutionalists rely). In that interpretation, voters are each expressing their own preferences. See Edelman, *supra* note 19, at 332–33 (noting that in polling model, “what is considered right is the same as the outcome of a majority vote among all of the voters”). In the informational interpretation, however, voters are each guessing about a common, exogenously defined right answer.

32. See David M. Estlund et al., *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 *Am. Pol. Sci. Rev.* 1317, 1322 (1989) (among requirements of the Jury Theorem is that voters must be “addressing a common question”) (Jeremy Waldron).

33. Thanks to Jack Goldsmith for emphasizing this point.

34. See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that conviction under state flag burning law violates First Amendment).

35. See *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000) (holding state partial-birth abortion law unconstitutional).

36. Compare *Johnson*, 491 U.S. at 420, with *United States v. Eichman*, 496 U.S. 310, 319 (1990) (holding that federal flag burning statute violates First Amendment); *Stenberg*, 530 U.S. at 945–46, with *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (upholding federal partial-birth abortion statute).

37. See Oliver Wendell Holmes, *Law and the Court* (1913), reprinted in *Collected Legal Papers* 291, 295–96 (1920).

Similar problems arise even when the earlier and later decisions involve the same level of government, on precisely the same constitutional issue. Suppose that at Time 1, the Court decided that capital punishment did not violate “evolving standards of decency.”<sup>38</sup> Is this an informationally useful precedent if, at Time 2, the Court faces the same question again? Not necessarily, because standards may have evolved even further. In this example the problem of change over time is right on the surface of the doctrinal test, but the same problem may arise in less transparent form. If at Time 1 the Court held that a certain rule of criminal procedure is or is not “implicit in the concept of ordered liberty,”<sup>39</sup> does this mean that a Court facing the same issue at Time 2 is answering the same question? Even if, say, the two cases are a generation or more apart? Any account of constitutional interpretation and adjudication that has even a dollop of sensitivity to changed circumstances—which is to say most such accounts, except perhaps for the most stringently backward-looking forms of originalism—will code the questions that the Justices ask in these two cases as critically different.

Finally, and most generally, in a regime of precedent there will necessarily be a difference between the questions asked in cases of first impression and in all subsequent cases. At Time 1 the question is what legal rule the court should adopt; at Time 2 (or 3 or N) the questions include how much weight to give to the Time 1 precedent. Because the question at Time 1 always differs from the question(s) at Time 2 (or Time N), one cannot straightforwardly aggregate information across the divide between examination and reexamination of legal questions. Adherence to a regime of precedent itself undermines the commonality of questions that is necessary for the Condorcetian interpretation of precedent.

One must not overstate these points, because a slight shift in the relevant questions does not deprive previous precedents of all informational value to current decisionmakers. Suppose that a decade ago, judges decided that a particular practice did not violate widespread standards of decency. Suppose also that judges today must decide whether the same is true today, under an evolving standard. It is surely relevant information to know that as of a decade ago, decency did not condemn the practice. But we cannot straightforwardly rely on the miracle of Condorcetian aggregation in a case like this, because we cannot lump together in a single notional voting group two different sets of judges deciding two different questions.

The Condorcetian interpretation of Burke trades on a kind of metaphor, one not dissimilar to Burke’s own description of tradition as the “bank and capital of nations and of ages.”<sup>40</sup> In the implicit metaphor of the common law constitutionalists, the Justices who have participated in a

---

38. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

39. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

40. *Burke*, *supra* note 1, at 74.

line of decisions are thought of as deciding, in common, on the same question. But in many cases, no meeting of the many minds ever occurs. The metaphor here is affirmatively harmful. It obscures that the many minds participating in the line of precedent answer questions that shift subtly over time with changing circumstances, changed legal contexts, and novel applications of preestablished legal rules.

4. *Independence, Herding, and the Burkean Paradox.* — Another critical condition for the Jury Theorem to apply (in its strongest form; I will explain the qualifier shortly) is that the votes or guesses that are aggregated must be independent of each other.<sup>41</sup> For brevity I will speak of the “requirement” of independence, but here too one must be careful. Nonindependence just reduces the number of effective votes or guesses in the pool. If there are ten voters, and nine utterly defer to a leader, guessing exactly as the leader guesses because the leader does so, then only one vote counts.

This need not mean that the average competence of the group decreases. If the leader is of much higher average competence than the followers, it may even increase, at least if the followers would otherwise be more likely to guess wrong than right. Group performance under the Jury Theorem is a function of both numbers and competence; deference to relatively competent opinion leaders can improve performance under some conditions.<sup>42</sup> Nonetheless, under a broad range of conditions, the more independence, the more separate judgments and dispersed information are aggregated into the group judgment, the better the Condorcetian credentials of the precedent or tradition.

This criterion should not be applied too stringently. Independence is not violated by mere deliberation, or just because people influence one another's views. The independence required by the Jury Theorem is a strictly mathematical notion.<sup>43</sup> It means that Voter 2 does not decide to vote just as Voter 1 votes, however that is; it does not mean that Voter 1 cannot influence Voter 2's independent judgment, through discussion or otherwise. Deliberation by itself does not compromise independence.

That said, however, true failures of independence can arise from many causes. One cause is power—the power of ruling regimes, interest groups, or even court leaders. Suppose that the precedents of a given era were generated, not by statistically independent consideration by a panel of Justices, but by a panel of Justices who were political cronies following the lead of the White House, or the lead of outside groups, or who (like the Justices of the Marshall Court) systematically deferred to the Chief Justice. The reduction of independence reduces the number of effective votes. When we turn to comparative institutional problems later in the discussion, the role of power will become important: Arguments that im-

---

41. See Estlund et al., *supra* note 32, at 1326 (Jeremy Waldron).

42. See generally David Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 *Theory & Decision* 131 (1994).

43. See Estlund et al., *supra* note 32, at 1327 (Jeremy Waldron).

peach the Condorcetian credentials of other institutions, such as legislatures, on grounds of interest group power or other process failures must consider the same possibilities with respect to judicial institutions.

An important special case in which independence is violated involves informational cascades.<sup>44</sup> Such cascades can arise even if all actors are rational and are attempting to make the best possible individual guess. Where each person has a small stock of private information, the rational guesser will do best to mimic the judgments of guessers earlier in the sequence, because their total information swamps his own. The result can often be a bad equilibrium in which a long sequence of people, deferring to erroneous guesses earlier in the sequence, make erroneous guesses themselves.<sup>45</sup> This outcome is collectively bad but individually rational; each person followed the best strategy for themselves, but the outcome for all is a bad cascade.

Cascades can occur in courts as well as in society generally; a line of precedents may represent little more than a rational decision by later judges to ignore their private information in favor of what earlier courts have said. Where this occurs, later decisions in the line of precedent are not independent contributions that add to the informational value of the whole; although decisions accumulate, the information implicit in the line of precedents does not increase. Although some argue on a priori grounds that precedential cascades are unlikely,<sup>46</sup> they have in fact been documented under quite ordinary conditions.<sup>47</sup>

In some settings, cascades are fragile to small changes in information and motivations; although easily started, they are easily shattered as well.<sup>48</sup> In markets, cascades can often be dispelled by releases of information from government or firms. Cascades embody surprisingly little information; after the first few guessers, all others are rationally following the herd. Hence a small addition of information can cause actors later in the

44. For an overview, see Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, *J. Econ. Persp.*, Summer 1998, at 151 [hereinafter Bikhchandani et al., *Behavior of Others*].

45. For a simple example, see Sushil Bikhchandani et al., *Informational Cascades and Rational Herding* (June 1996), at <http://welch.econ.brown.edu/cascades> (on file with the *Columbia Law Review*).

46. Eric Talley, *Precedential Cascades: An Appraisal*, 73 *S. Cal. L. Rev.* 87, 92 (1999) (concluding that necessary conditions for precedential cascades are “implausible” and that “it is extremely difficult . . . to verify whether observed judicial conformity is the byproduct of a cascade or of some omitted third factor that commonly affects all judges”).

47. Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 *Am. L. & Econ. Rev.* 158, 161–65 (1999) (describing precedential cascade involving retroactive reach of Coal Industry Retiree Health Benefit Act of 1992).

48. See generally Cristina Bicchieri & Yoshitaka Fukui, *The Great Illusion: Ignorance, Informational Cascades, and the Persistence of Unpopular Norms*, 9 *Bus. Ethics Q.* 127, 147 (1999) (concluding that “it may take surprisingly little new public information to reverse the original cascade”).

sequence to change their guesses, breaking the cascade.<sup>49</sup> If this fragility to new information worked straightforwardly in the case of precedential cascades, one might have reason to think that most lines of precedent represent the informational contributions of many minds, rather than a cascade.

However, precedential cascades are probably relatively robust. The reason is that “the passive nature of courts . . . means that erroneous decisions made by one level in a system of courts potentially remain uncorrected, even though all courts are trying to make principled judgments.”<sup>50</sup> If the Supreme Court follows its usual practices of case selection, it will not grant certiorari in cases where all lower courts have cascaded to an agreement, and so will have no occasion to overturn the lower court consensus. Litigants, seeing the lower court consensus and knowing that Supreme Court review is unlikely, are unlikely to challenge the consensus in the first place. By virtue of the structure of the judicial system and the passivity of the courts, precedential cascades are plausibly less fragile than cascades in markets or society generally.

Changes in motivation or incentives—in the reward structure of individual action—can also dispel cascades or prevent their arising in the first place. Where each person is attempting, not to make the best possible individual guess, but to make the guess that will prove most useful to the group, each guesser will ignore the earlier guesses and record her unaided view of the problem.<sup>51</sup> When this happens, each guesser discloses more private information to be aggregated into the group judgment, and the quality of the group judgment improves. The same effect can arise not only from incentives, but also from cognitive quirks. Irrationally overconfident individuals contribute a great deal to the group; precisely because they are overconfident, they tend to contribute private information that can help to block or shatter cascades.<sup>52</sup>

The significance of all this is to reveal a tension at the foundations of the Burkean view—what I will call the *Burkean paradox*. The paradox is that if many participants in the line of precedent or tradition followed the precedent or tradition (rather than exercising their independent reason) because doing so was a way to conserve on decisionmaking costs or improve their information, then the informational value of the line of precedent or tradition is lower to that extent; there are fewer independent minds contributing to the collective wisdom. The line of precedent or tradition itself becomes a kind of informational cascade, which lowers the total informational value of the whole. The sting in the problem is

---

49. Bikhchandani et al., *Behavior of Others*, supra note 44, at 157–58.

50. Daughety & Reinganum, supra note 47, at 159.

51. Cass R. Sunstein, *Why Societies Need Dissent* 66–70 (2003).

52. Cf. Antonio E. Bernardo & Ivo Welch, *On the Evolution of Overconfidence and Entrepreneurs*, 10 *J. Econ. & Mgmt. Strategy* 301, 326–27 (2001) (showing conditions under which irrational overconfidence of entrepreneurs in not following actions of others improves quality of aggregated information).

that a strategy that is individually rational for judges at any given time—following precedent—is harmful to all if followed by all because it drains precedent or tradition of any epistemic value.<sup>53</sup> Burkeanism might even be analogous to a kind of informational pollution, giving rise to severe problems of collective action: It is individually rational but collectively harmful for individual decisionmakers to rely on precedent or tradition, rather than their unaided reason.

Obviously much depends on the specifics of the cascade at issue. Some cascades can cause stampedes in the right direction, not the wrong direction (according to whatever exogenous definition of right answers we have assumed). And cascades are fragile in many ways, tending to shatter as circumstances change. But to the extent that precedent or tradition rest on cascades, rather than the independent and unaided contributions of many minds, Burkean praise for precedent or tradition is self-defeating. The best contributions to the stream of precedent or tradition are those in which individual judges, or small groups of judges, do exercise their unaided reason. Those who rely on precedent or tradition on the ground that it is the “bank and capital of ages” make withdrawals from the common pool of information, for their private benefit; those who exercise their unaided reason contribute to the common pool, for the good of all future judges.

5. *Random or Correlated Biases.*<sup>54</sup> — Another strand of Bentham’s critique of the common law centered on the professional self-dealing of “Judge and Company.”<sup>55</sup> The judges and lawyers who administered the common law of England, on this view, constituted an elite guild who arranged the legal system in ways that benefited the legal profession, to the harm of the polity at large. Bentham interpreted this claim by diagnosing Judge and Company as promoters of their “sinister interest[s]” (a motiva-

---

53. In principle, judges might prevent the Burkean paradox from arising by issuing opinions that record their independent judgments while basing their actual decisions on precedent. In this model, later courts will have both the precedent based decision, which is of low or nil informational value, and the earlier court’s independent judgment, which has positive value. Although this may sometimes happen, I believe it is rare, for both an economic reason and a psychological one. The economic reason is that judges decide on the basis of precedent in part to conserve on the costs of decisionmaking for themselves. To incur the costs of forming an independent judgment that, by hypothesis, will not affect the current decision is to provide a benefit only to future judges and is thus a contribution to an informational public good; many judges will free ride, and the informational public good will be underproduced. The psychological reason is that it is hard to keep one’s precedent-independent judgment from being infected by what many judges and other people in the past have said. Although the claim that the views of people in the past constitute our present identity is mysterious, the claim that those views structure our present thinking is not.

54. Parts of this subsection draw upon a similar discussion in Adrian Vermeule, *Should We Have Lay Justices?*, 59 *Stan. L. Rev.* 1569, 1589–90 (2007).

55. See Jeremy Bentham, *Introductory View of the Rationale of Evidence*, in 6 *The Works of Jeremy Bentham* 22–24 (John Bowring ed., London, Simkin, Marshall & Co. 1843).

tional distortion) or as in the grip of “interest-begotten prejudice” (a cognitive distortion arising from a motivational distortion).<sup>56</sup>

However, we may also interpret Bentham’s core concern in less sinister terms, and in a way that fits comfortably within the framework of the Jury Theorem. In this interpretation, the decisions made by Judge and Company are less accurate than might otherwise be the case because judges suffer from *correlated biases*. We must distinguish two issues, competence and the direction of error. Competence is the likelihood that an individual or an average group member will err. But if group members err, it is best if their errors are uncorrelated—if they are as likely to err in one direction as another. Where error is randomly distributed, biased guesses in either direction wash out, on average, and true guesses prevail.<sup>57</sup>

Random distribution of bias is a major force behind the Jury Theorem. Where errors are correlated—where group members are subject to a common and systematic bias that causes them to err in only one direction—group performance can fall dramatically. The chance of a majority selecting the right answer varies inversely with the correlation of bias across the group.<sup>58</sup> This implies that under plausible conditions, a group of lower average competence, but with uncorrelated biases, will outperform a group with higher average competence but highly correlated biases. Counterintuitively, the effect of correlated biases is so strong that *adding worse-than-random guessers to a group can improve overall performance if their biases are negatively correlated with those of highly competent experts*.<sup>59</sup> Here too, of course, everything depends upon the precise numbers, but the crucial point is that “[t]he uninformed voters drive the average correlation down, thus more than compensating for their relative ignorance.”<sup>60</sup>

From a Benthamite perspective, the problem is that Judge and Company are likely to have highly correlated biases, arising both from a common socioeconomic background and from their common professional training. On one view, “[m]ost lawyers, whatever their background, have

56. Bentham, Handbook, *supra* note 30, at 34–36.

57. There is a similarity here to Cardozo’s idea that “[t]he eccentricities of judges balance one another” so that “out of the attrition of diverse minds there is beaten something which has a[n] . . . average value greater than its component elements.” Benjamin N. Cardozo, *The Nature of the Judicial Process* 177 (1921).

58. See Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 *Am. J. Pol. Sci.* 617, 625–30 (1992).

59. See *id.* at 628–29.

60. *Id.* at 629. In Ladha’s example, a group of three decisionmakers each competent at the .8 level cannot be certain of getting the right answer whatever the voting rule. However, if the group adds two uninformed, worse-than-random guessers, whose competence is a mere .3, then the group is certain to choose the right answer so long as the guesses of the uninformed are negatively correlated with those of the informed. See *id.*

a narrow, professionally inflected perspective on governance.”<sup>61</sup> Even more broadly, the values of lawyers as lawyers often have the “smell of the lamp about them.”<sup>62</sup> As compared either to ordinary people or to other professionals, lawyers are generally more introverted, more rational as opposed to emotional, more judgmental, more competitive, aggressive, and materialistic;<sup>63</sup> they also have distinctive policy biases.<sup>64</sup>

Suppose that lawyers do have correlated biases. Suppose, for example, that lawyers—and hence judges—are likely to systematically err on the high side when they attempt to estimate the costs and benefits of additional legal process in government decisionmaking, and thus will tend to require government to afford extra increments of process whose social costs are greater than their social benefits.<sup>65</sup> As compared to a group whose errors are randomly distributed, the guesses of a group of past lawyers—the judges deciding the cases now relied upon as precedent—are less likely to track right answers about the value of process. This reduces the informational value of the precedents to future judges who are trying to draw aid from many judicial minds in the past.

The key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways. The correlation of biases across the decision-making group trades off against the competence of the group’s members. Even if judges are elite experts, of very high average competence, their likemindedness reduces group performance overall, narrowing the margin of superiority between the performance of a single judge or group of judges exercising their unaided reason today, and a judge or group of judges drawing on precedent. This is an updating of Bentham’s critique of legal and judicial professionalism: Rather than point to motivational distortions on the part of lawyers and judges, one may also claim that common professional training reduces the informational quality of judicial decisionmaking, even if all judges and lawyers are sincere.

---

61. Richard A. Posner, *Law, Pragmatism, and Democracy* 128 (2003).

62. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 59 (1980).

63. See Susan Swaim Daicoff, *Lawyer, Know Thyself* 40–42 (2004).

64. Three relevant hypotheses, in roughly descending order of rigor, are that: (1) legal training gives lawyers a strong status quo orientation and a bias to conventional morality, as compared to similarly educated adults, see Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 *Law & Psychol. Rev.* 39, 44–48 (1982); (2) legal training reduces law students’ general concern for social justice, see Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of a Law School*, 59 *Soc. Sci. Q.* 347 (1978) (noting this hypothesis, but then conducting study that suggests that law school does not affect students’ outlook on social justice), and reduces their interest in public service or public interest lawyering, see Robert Granfield & Thomas Koenig, *Learning Collective Eminence: Harvard Law School and the Social Production of Elite Lawyers*, 33 *Soc. Q.* 503, 517–18 (1992); (3) legal training causes lawyers to favor cumbersome and complicated processes for generating policy, see, e.g., Jerold S. Auerbach, *A Plague of Lawyers*, *Harper’s*, Oct. 1976, at 37, 40–42.

65. Cf. Auerbach, *supra* note 64, at 41–42 (suggesting that legalization of society places priority on individual procedural rights to detriment of substantive norms).

C. *Burke, Condorcet, and Constitutional Law: Comparative Institutional Problems*

So far we have examined some problems that arise within the logic of the Condorcetian interpretation of Burke, both as applied to social traditions in general and as applied to judicial precedent in particular. Here I will turn more specifically to problems with *constitutional* precedent and tradition. In both cases, comparative institutional problems become critical.

A judge or group of judges deciding constitutional cases at a given time may turn to the information embodied in precedent to improve their decisionmaking. The Condorcetian interpretation of Burke describes the conditions under which using precedent in this way will improve upon the unaided reason of current judges. Yet in the constitutional setting, there are always alternative sources of information available: the judgments of past constitutional framers, of current legislatures, and of the current executive. Even if the collective wisdom of many past judges is superior to that of one or a few present judges, on Condorcetian grounds, it does not at all follow that the collective wisdom of many past judges is superior to that of other institutions.

The same basic analysis applies to traditions, albeit with modifications. Social traditions stand on somewhat better epistemic ground than strictly judicial traditions; but where such traditions are refracted through judicial decisions, their Condorcetian credentials can be no better than that of the judges themselves, who must identify and apply the traditions. On the other side of the equation, legislators too can draw upon social traditions, and will have Condorcetian advantages in doing so. Ultimately, the same comparative institutional problems afflict common law constitutionalism whether the focus is on precedent or tradition.

1. *Past Judges and Framers.* — In many cases, the principal target of common law constitutionalists is originalism, which is the view that the Constitution should be interpreted according to its public meaning at the time of enactment.<sup>66</sup> As against the originalist view, common law constitutionalists offer a vision of cases unfolding over time and embodying the aggregated wisdom of many minds. Common law constitutionalists see the text as a starting point for a process of incremental traditionalism, in Burkean fashion. In this opposition, originalism suffers from a dead hand problem—why should the views of past framers control the living?—while common law constitutionalism is a form of living constitutionalism.

But which approach is better on informational grounds? Here we must distinguish originalism as a first-best view from originalism as a second-order decisionmaking strategy. On the former version, originalists

---

66. I take this “public meaning” originalism to have become the standard version, superseding the older “framers’ intentions” version of originalism. The differences between them make no difference to the analysis here.

claim that the original understanding just is what the Constitution means, perhaps what any written constitution necessarily means. To engage in interpretation is, necessarily, to ask about what the framers or ratifiers of a document understood it to mean.<sup>67</sup> On the latter version, originalism is a strategy of second-order rationality, just like common law constitutionalism. “Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”<sup>68</sup> Here too, different originalists might have different accounts of what first-order value—welfare, justice, and so on—is served by this strategy; originalism would represent a lower-level converging agreement across these camps on a method of constitutional interpretation.

The relevant point, however, is that originalists suggest that the highest source of latent wisdom is the text and original understanding.<sup>69</sup> For second-order originalists—those who think that originalism is a good second-order strategy for constitutional adjudication, rather than an account of the essence of interpretation—a key claim is that text and original understanding are informationally superior to other sources of law that judges might draw upon in constitutional cases. Below, I will offer some reason to doubt the truth of this claim, but it is theoretically crucial. It emphasizes that common law constitutionalists must consider the informational credentials of all relevant sources of law before declaring in favor of a regime of strong precedent.

We must be clear about what comparison is being made, exactly. Sometimes, perhaps often, original texts and understandings are ambiguous or general; in such cases common law constitutionalists invoke precedent to supplement the original understanding, rendering it sufficiently specific to determine the outcome of litigated cases. When this is so, the informational content of originalism and the informational content of common law constitutionalism are additive; text, history and precedent are supplements, not competitors.

Still, this is not always so. The testing case for both originalism and common law constitutionalism occurs when (let us stipulate) there is a clear original understanding, a clear line of precedent, and the two are in conflict. Should the views of framers and ratifiers or the views of later

---

67. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L.J.* 1823, 1833–34 (1997); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 *Colum. L. Rev.* 2207, 2224 (2006) (book review).

68. Cass Sunstein & Randy Barnett, *Constitution in Exile?*, Legal Affairs Debate Club, May 3, 2005, at [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp) (on file with the *Columbia Law Review*).

69. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey**, 22 *Const. Comment.* 311, 345–46 (2005) (“[T]he Supreme Court ought to follow the constitutional text over precedent.”).

judges prevail? Let us suppose that, despite the internal problems surveyed above, a stream of precedents does embody aggregated wisdom or information that is superior to that of a single judge or small group of judges today. Still, it is a very different question whether that stream of precedent is informationally superior to the views of framers and ratifiers in the past.

We will assume that the necessary conditions for a Condorcetian analysis are satisfied; in other words, that all members of the relevant groups (framers, ratifiers, and later judges) were addressing a common question, voted sincerely, and so on. What is the relative average competence of the decisionmaking groups being compared? Which group will be more likely to answer the relevant questions correctly? From an informational perspective, there are many difficult issues to be untangled, because the tradeoffs are numerous and cross-cutting.

On Benthamite grounds, but contrary to Bentham's own prejudices, past judges have an informational advantage over framers and ratifiers of the even more remote past, all else equal. This is a central point of common law constitutionalism: Post-framing judges have had the opportunity to learn from experience<sup>70</sup> or to acquire new information about the costs and benefits of framing-era choices. In Condorcetian terms, more information yields higher average competence.

However, other considerations are relevant as well. On some views, the Framers were superior statesmen, possessed of extremely high competence that might compensate or more than compensate for their relative lack of information. One might explain this higher wisdom of the Framers (if it exists) either by a selection mechanism or by reference to the circumstances of the founding era. As for selection, one might hold that the Framers were the elite of the nation, selected from among the notables of their states, as opposed to later judges who often took the bench through cronyism or party service. As for circumstances, one might believe that emergencies and national crises produce sharpened cognition in lawmakers, because the costs of making mistakes are higher, and that crises produce emotional states—of solidarity with contemporary citizens and with future generations—that induce more effort for the public good.

Even if neither selection nor unusual emotional states suffice to induce extraordinary competence in constitutional framers, the high costs of information in founding eras can help along other Condorcetian margins. Behind the "veil of uncertainty," lack of information makes it equally easy to err in one direction or another.<sup>71</sup> Sincere framers at-

---

70. Cf. Strauss, *Common Law Genius*, *supra* note 27, at 8 (arguing that under common law approach one can break with past if one can "show that the . . . old regime did not work very well").

71. John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *Utilitarianism and Beyond* 39, 44–46 (Amartya Sen & Bernard Williams eds., 1982) (explaining equiprobability model of moral judgments).

tempting to guess the welfare-maximizing constitutional rule will know less than later generations, but will also be less biased, precisely because they are less likely to know the rule's distributive consequences for themselves, their friends, family, profession, or social class. There is thus a tradeoff between the framers' relative lack of information about the consequences of the rules they adopt, on the one hand, and their relative impartiality, on the other.<sup>72</sup> In the Jury Theorem's terms, lack of information reduces competence, but pervasive uncertainty reduces the correlation of biases and pushes the whole group toward randomly distributed error, which is desirable.

Furthermore, there is a crucial problem of numbers, rarely discussed by common law constitutionalists. Burke did not clearly distinguish tradition from judicial precedent, but we have seen that a major distinction between the two is that the numbers involved in the latter are much smaller, especially at the Supreme Court level. The problem bites hard when a Condorcetian interpretation of precedent is compared to a Condorcetian interpretation of originalism. The Framers and ratifiers, taken as a group, were a large body, even in the small population of eighteenth century America. To be sure, they were also an internally heterogeneous group, and it seems plausible that the average competence of the Framers was higher than the average competence of the ratifiers. But so long as the latter were more likely to get the answer right than wrong, on average, their numbers virtually guarantee that they would have done so. With a voting population of, say, one thousand framers and ratifiers, a very low average competence (so long as it is greater than .5) suffices to all but guarantee a correct answer.

No such guarantee is possible for the relative handful of Justices, slightly more than one hundred, who have ever sat on the Supreme Court; and of course for any given precedent, the number of Justices who have ever voted in the relevant sequence of cases is much smaller than that. This comparison looks better if the lens is expanded beyond precedent, properly so-called, to include lower court judges, academics providing background commentary, and other participants in the ongoing legal community that surrounds the Court. That expansion, however, is itself problematic on several grounds. The first is that it strains the requirement of a common question. Lower courts, for example, often do not ask the same question as the Supreme Court, precisely because they are lower courts and thus have a hierarchical obligation to respect the Court's precedent, an obligation with no analogues on the Court itself. The second is that behind the Framers and ratifiers there also stand broader intellectual communities; why should not their "votes" be aggregated as well?

---

72. See Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* Ch. 27–54 (2007).

In the hardest case, where subsequent precedent contradicts text and original understanding, it is not obvious that framers and ratifiers as a decisionmaking group are inferior, along dimensions of information and effective aggregation, to a series of later judges. Everything depends on particulars, and few generalizations are possible. This means that if the main target of common law constitutionalism is originalism, and the main weapon for striking the target is the Condorcetian theory of information aggregation, then the strike largely misses its mark.

None of this is intended to defend originalism, which is presumptively objectionable on Benthamite grounds: All else equal, changing circumstances demand that decisions be made not by the framers of centuries ago, but by decisionmakers with better current information, especially as the founding era and the last major episodes of formal constitutional revision (Reconstruction and the Progressive era) recede into the distant past. The only point here is that common law constitutionalism has yet to come to grips with the problem that an informational defense of precedent must consider, and compete with, an informational defense of text and original understanding.

2. *Past Judges and Current Legislatures: Burke, Condorcet, and Thayer.* — A different comparison is between (1) a line of judicial precedent that announces some rule and (2) a statute that contradicts that rule. In order to bias the inquiry in favor of common law constitutionalism, I will assume that when the statute is enacted there is already a clear and consistent line of Supreme Court precedent to the contrary, and that the underlying constitutional provisions are ambiguous, vague or general. This must be the best case for common law constitutionalism, insofar as overriding the view of current legislatures is concerned.

However, in cases of this type, the same Condorcetian arguments that common law constitutionalists deploy against originalism also support judicial deference to the views of current legislatures. Precedent might beat original text, but be beaten in turn by current statutes. If that is so, then the logical consequence of the informational interpretation of Burke is not robust judicial review, in the style of the Warren Court; rather it is deference to legislative judgments. On this account, Burke leads via Condorcet to James Bradley Thayer, who argued for judicial deference to current legislatures in all but the clearest cases of legislative mistake.<sup>73</sup>

To make progress on these issues, let us temporarily stipulate to some crucial assumptions that I shall examine in the subsequent discussion. First, suppose that the legislators who enact the statute and the courts who review it both address the common question of its constitu-

---

73. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) (arguing that courts “can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question”).

tionality (whether or not the legislators also address its merits as policy). Second, suppose that the legislators who voted for a statute are on average more likely to get that question right than wrong, as are the judges who review it. Third, suppose that both legislators and judges sincerely vote their views of the statute's constitutionality. Obviously all of these assumptions often fail to hold, but that is irrelevant. Legislators may not vote sincerely, but judges may not either. Theorists who justify precedent on jury-theoretic grounds assume sincere voting among judges, so we will do the same among legislators, in order to be able to compare apples with apples.

Given these assumptions, several stylized facts about legislatures threaten to give them an overwhelming Condorcetian advantage: the sheer numerosity of their members, their voting practices, and their powerful tools for acquiring information. I will take up each of these in turn, beginning with numbers. It is highly likely that legislatures with hundreds of members proceeding under majority rule will vote correctly, even if their average competence is near-random, just because of their sheer numbers. With a mere 301 voters—a smaller group than the House of Representatives—and an average competence of only .6, a majority will be almost certain to choose correctly between two options.<sup>74</sup> In comparative terms, even if the average competence of Justices is much higher than that of legislators, it is extremely unlikely that the nine Justices sitting at any one time, or even the few dozens of Justices who participate in a line of precedent, can do better than a highly numerous legislature, just because it is hard to improve on a vote that is almost certain to be correct. Suppose that the Justices are much better lawyers than, say, the average senator or even than the members of the judiciary committees. Not much follows. The distinctively Condorcetian contribution is that numbers matter; many near-incompetents can do better than a small panel of elite experts.

Quite obviously, the crucial question here is whether legislators' average competence is greater or less than one-half (in the two-option case). I put aside the argument that legislators might always raise their competence to .5 by flipping a coin; this overlooks that an incompetent voter might not realize his own incompetence. The more serious problem is that, as Condorcet himself suggested, average legislative competence might slip below the crucial threshold of one-half precisely because of the large number of members. "A very numerous assembly cannot be composed of very enlightened men. . . . [T]he more numerous the assembly, the more it will be exposed to the risk of making false decisions."<sup>75</sup> However, we should not overstate the problem. We need only enough confidence in the mechanisms of legislative decisionmaking to believe

---

74. See List & Goodin, *supra* note 18, at 287 tbl.1. If average competence in the group of 301 falls to .51, barely better than random, the majority's chance of choosing correctly is about sixty-four percent. See *id.* at 287.

75. Condorcet, *Application of Mathematics*, *supra* note 17, at 49.

that legislators are on average only slightly better to get the relevant question right than wrong. If the undemanding threshold is met, then numbers will tell.

Legislative institutions help to push individual legislators up to this threshold. Begin with voting practices. In most legislatures on most issues, voting occurs relatively simultaneously.<sup>76</sup> Bentham observed that the simultaneity of legislative voting dampened “undue influence,” because legislators vote in ignorance of how other legislators have actually voted.<sup>77</sup> By contrast, where all the judges who participated in a stream of precedents over time are aggregated into a notional voting group, later judges know how earlier judges voted and can defer to their predecessors—the sort of rational imitation that yields information cascades.

Most important are the institutional determinants of legislative information. By virtue of the extreme internal specialization of the committee system, large legislative staffs, and the professionalism of the legislative career (at the federal level and in many states, though not all), modern legislatures are engines for generating and processing information. The seniority norm and the proliferation of subcommittees imply that a member of the modern House of Representatives spends many years becoming deeply expert in a narrow slice of public policy.<sup>78</sup> This has two cross-cutting effects. On the one hand, specialization raises the average competence of members, including members who have influence on constitutional questions, such as members of the judiciary committees. On the other hand, floor deference to the committees reduces the number of effectively independent votes. The upshot is a smaller number of more competent votes, and the result is unclear. But it is not implausible to think that average competence in a modern legislature, highly professionalized and specialized by virtue of an elaborately reticulated committee system, is much higher than in legislatures of the eighteenth century.

So too, as compared to courts, legislators plausibly have better information than judges about the factual components and causal consequences of their constitutional decisions. Here the main tradeoff is between evenhandedness and information. Judicial procedures are designed to ensure equality of inputs, a form of evenhandedness. This is basically a leveling-down strategy of institutional design: By virtue of

---

76. When the House leadership held open voting for three hours to allow time to round up members to vote for a controversial prescription drug bill in 2003, an outcry resulted. See John K. Iglehart, *The New Medicare Prescription-Drug Benefit—A Pure Power Play*, 350 *New Eng. J. Med.* 826, 828–29 (2004) (describing how “embittered Democrats” denounced vote as “a travesty”). The new Democratic Congress elected at the end of 2006 limited this practice by providing that votes may not be held open “for the sole purpose of reversing the outcome.” See House Rule XX, cl. 2(a), available at [http://www.rules.house.gov/ruleprec/house\\_rules.htm](http://www.rules.house.gov/ruleprec/house_rules.htm) (on file with the *Columbia Law Review*).

77. Jeremy Bentham, *Political Tactics* 106–07 (Michael James et al. eds., 1999).

78. See Keith Krehbiel, *Information and Legislative Organization* 142–43 (1991) (arguing that division of labor into committees combined with seniority system fosters expertise).

prohibitions on ex parte contacts and equal time for briefing and argument, no party has an advantage in presenting information to the judges. Moreover, the lack of any electoral connection on the part of federal judges gives them a remoteness from current politics. The price of this evenhandedness and remoteness, however, is a relative dearth of information.<sup>79</sup> Legislators hear from many more interests and social sectors, in both formal and informal ways. Aggregating across some dozens of judicial minds ameliorates this problem, but does not plausibly overcome the massive initial advantage of legislative numbers and specialization in the Condorcetian framework.

3. *Endogenous Information and Rational Ignorance.* — A further set of considerations that bear on the Condorcetian credentials of current legislatures involves incentives to acquire information. The basic problem is that the amount of information each voter (whether legislator or judge) decides to acquire is endogenous to the size of the voting group. In large legislatures, each legislator has an incentive to remain rationally ignorant. The legislator will invest less in informing herself about the questions at hand if she estimates that, because of the legislature's large size, she is extremely unlikely to be the decisive voter in any event. More generally, information and deliberation are collective goods in legislatures; each member may attempt to free ride on the expertise of others.<sup>80</sup> As Bentham himself put it:

The greater the number of voters the less the weight and the value of each vote, the less its price in the eyes of the voter, and the less of an incentive he has in assuring that it conforms to the trued end and even in casting it at all.<sup>81</sup>

All else equal, these considerations tend to undercut the informational advantages of legislatures. On this view, the comparative advantage of courts is their relatively small size. By raising each judge's probability of being the pivotal voter, the incentive to acquire information is greater, and it is easier for all members of the group to engage in mutual monitoring of free riders. On a nine member Supreme Court, each Justice has a nontrivial chance of being the swing voter, and colleagues will notice and disapprove if a Justice acquires no information before voting.

However, these considerations are themselves undercut by other features of legislatures. It is not clear, in the abstract, how the endogeneity

79. See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* 141 (1994) (noting tradeoff between information and evenhandedness).

80. Cf. Christian List & Philip Pettit, *An Epistemic Free-Riding Problem?*, in Karl Popper: *Critical Appraisals* 128, 138–40 (Philip Catton & Graham Macdonald eds., 2004) (suggesting that knowledge of Jury Theorem among group's voters may increase temptation to free ride on information of others). For the tradeoff between group size and free riding on the information of others, see generally Drora Karotkin & Jacob Paroush, *Optimum Committee Size: Quality-Versus-Quantity Dilemma*, 20 *Soc. Choice & Welfare* 429 (2003).

81. Quoted in Jon Elster, *Explaining Social Behavior* 413 (2007).

of information nets out against the sheer numerosity of legislators. In some models of electoral voting, a large number of voters whose information is quite poor due to the rational ignorance problem can nonetheless be almost certain of getting the correct answer, just because numbers count.<sup>82</sup> The difference between a Supreme Court of nine members and a Congress of more than four hundred is plausibly too large—the initial Condorcetian advantages of the latter group are plausibly too great—to be sensitive to differential incentives to acquire information.

Furthermore, legislators often abstain from voting, whereas Justices very rarely do so. Rational abstention can allow uninformed legislators to, in effect, defer to colleagues who are known to be well-informed, thus raising the chance that the decisive vote will be cast by a well-informed voter.<sup>83</sup> Of course legislators who abstain often do so, in fact, for less high-minded reasons, but again we are assuming sincere and public-spirited behavior on all sides in order to focus on the informational comparison between legislatures and courts.

Finally, the relatively large size of legislatures merely reduces legislators' incentives to acquire information *as part of the legislative process*. It does not remove whatever information they begin with or acquire for other reasons. Analogously, in electoral models of rational ignorance, it has been pointed out that “[i]t is reasonable to believe that voters are involuntarily exposed to a flow of political information in the course of everyday activities”; the consequence is that even under rational ignorance, “successful information aggregation is possible because the information acquired by each voter goes to zero but it does so slowly enough to allow the effect of large numbers to kick in.”<sup>84</sup> As discussed above, it seems plausible that legislators begin with much more relevant information than do judges. Legislators acquire information relevant to judgments of constitutionality—information about societal mores and evolving standards of decency, the consequences of constitutional decisions, and the facts on which constitutional decisions rest—through their close contacts with constituents, government policymakers, and the broader society. By contrast, informational impoverishment is a principal cost of the judges' insulation from the hurly burly of government policy. So legislators' relative disincentive to acquire more information through the legislative process, if it exists, may not matter very much in light of legisla-

---

82. See César Martinelli, *Would Rational Voters Acquire Costly Information?*, 129 *J. Econ. Theory* 225, 240–41 (2005).

83. Cf. Timothy J. Feddersen & Wolfgang Pesendorfer, *The Swing Voters' Curse*, 86 *Am. Econ. Rev.* 408, 408–24 (1996) (discussing conditions under which uninformed voters will rationally abstain).

84. Martinelli, *supra* note 82, at 226–27; see also Minoru Kitahara & Yohei Sekiguchi, *Condorcet Jury Theorem or Rational Ignorance?* 4 (rev. Jan. 31, 2006), available at <http://wakame.econ.hit-u.ac.jp/~riron/Workshop/2006/sekiguchi06.pdf> (on file with the *Columbia Law Review*) (showing conditions under which “[e]ven if the amount of information acquired by each voter is small, the amount of aggregated information can be large enough to [reach] the correct decision”).

tors' initial informational advantages, just as a runner who gets a cramp may still win if her lead was large enough to begin with.

4. *Legislatures and Precedent.* — So far I have been speaking of the decisions of “current legislatures,” but this understates the information contained in legislation, which also draws on legislative traditions and precedents; there is thus a Condorcetian case for common law legislatures that parallels the case for common law courts. Like courts, legislatures aggregate over many minds, not only by virtue of legislatures' large memberships at any one time, but by using a kind of internal precedent, thus including the judgments of past legislators in current decisionmaking.

It is sometimes suggested that courts use precedent, while legislatures do not. All legislatures, on this view, act on a blank slate so far as formal law is concerned,<sup>85</sup> while courts are in some sense legally “bound” by precedent. Incremental and cumulative decisionmaking is integral to the judicial process, but no legislature is formally bound by past enactments, although past enactments of course set a policy status quo and thus allocate the burden of inertia in one way or another.

There is a confusion or slippage here between formal and functional arguments. The Condorcetian argument for judicial reliance on precedent has nothing to do with the legally binding force of precedent, whatever that means; it would be exactly the same in a system that had no such formal norm or rule. The Condorcetian argument is just that judges will do better, in their current decisions, by drawing on the latent information embodied in precedent. A system of judicial precedent economizes on the costs of decisionmaking—both process costs and error costs.

There is a parallel argument for legislatures. Even though legislatures are never formally bound by earlier enactments, and can always repeal internal rules, rational legislators will use past statutes and internal legislative interpretations of statutes and legislative rules as informational aids, economizing on process costs and reducing errors. This is not the same as the point that extant law creates a default status quo that must be overcome to enact new legislation. The informational use of legislative precedents applies even if those statutes are no longer legally in effect. A lapsed statute or rule may contain information relevant to designing new rules or policies in the present.<sup>86</sup>

---

85. Under the conventional view, legislatures may not entrench statutes by making it harder for a future legislature to repeal the statute than it was for the original legislature to enact it. For a critique of this view, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665 (2002). For critiques of the critique, see John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *Cal. L. Rev.* 1773 (2003); see also John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 *Yale L.J.* 483, 503 (1995).

86. Symmetrically, this implies that on the Condorcetian interpretation of precedent, judges should count overruled cases as information, despite their null legal status.

It is thus the routine stuff of legislative business for legislators to rely on past statutes, rules, and internal precedents in this informational sense. Drafters of new legislation often use old legislation as a starting point, modifying it to fit new problems and circumstances. Legislators will point to predecessor statutes to show that the body has already been regulating in a given field, or that past policy experiments have worked well and should be expanded, or that past policies have not worked well, or that policy in a given field is “settled.” And precedents dominate internal legislative interpretation, by house parliamentarians and legislators, of internal rules.

These points apply in the constitutional arena as well. Whether or not one thinks it useful to attach the label of “super-statutes”<sup>87</sup> to statutes that have somehow acquired a vaguely “constitutional” nimbus, legislatures clearly do enact statutes with a view to liquidating or construing an ambiguous constitutional text, and these statutes often become de facto entrenched over time. The mechanisms of this entrenchment are poorly understood,<sup>88</sup> but one such mechanism is plausibly Condorcetian. Present legislators may rely upon what past legislators did, not because they are in any sense bound by those decisions, but because they wish to incorporate and use the information latent in those decisions. Consider the decision, by a Republican-controlled Congress, to renew the Voting Rights Act<sup>89</sup> in 2006 without substantial opposition, and with many legislators from both parties arguing that the Act is now part of the legal fabric.<sup>90</sup> That the Act was due to sunset, and actually had to be affirmatively renewed, emphasizes that legislators’ use of past statutes as precedent does not depend on whether the past statute is still the status quo, or rather has lapsed.

We may describe this lawmaking strategy as Burkean, in the sense that current legislators do not rely solely upon their private stock of reason. Even if judicial precedent, possibly drawing upon broader societal

---

Suppose that at Time 1, nine Justices voted unanimously for Rule R, but then at Time 2, a different nine Justices voted 5-4 to overrule the Time 1 precedent in favor of rule S. Putting aside the problem that the Justices at Times 1 and 2 were not really addressing the same questions (because only the former was a case of first impression), a Justice sitting at Time 3 should aggregate over the whole group of eighteen Justices, counting the “vote” as 13-5 in favor of R.

87. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes: The New American Constitutionalism*, in *The Least Examined Branch* 320 (Richard W. Bauman & Tsvi Kahana eds., 2006).

88. For some speculations, see *id.*

89. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

90. The Act was renewed with support from the Republican House leadership. It passed the House by a vote of 390-33 and the Senate by a vote of 98-0. See Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, N.Y. Times, July 14, 2006, at A13 (describing House vote and initial opposition to Act); Carl Huse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. Times, July 21, 2006, at A1 (describing Senate vote).

traditions, aggregates latent information relevant to constitutional law, the episode of the Voting Right Act suggests that legislatures too are common law constitutionalists. Praise for the latent wisdom contained in precedent says nothing at all about the crucial comparative question, which is whether common law constitutionalism is best carried out in legislatures or in courts, where the outcomes of these two processes conflict.

The upshot is that if judges draw on the contributions of many minds aggregated in past judicial decisions, legislators draw on the contributions of many minds aggregated in past legislative decisions. Recall the counterintuitive argument that the Warren Court was actually a “common law court” in the sense that its major decisions were traceable to background lines of judicial precedent or broader political traditions.<sup>91</sup> By the same token, one might make out a case that the Congress of some innovative era was actually a common law Congress. An example is the Endangered Species Act of 1973,<sup>92</sup> sometimes described as a statute that made a radical break with the past, but which actually built upon the Endangered Species Conservation Act of 1969<sup>93</sup> and the Endangered Species Preservation Act of 1966,<sup>94</sup> as well as even earlier legislation and treaties applicable to migratory birds and federal lands.<sup>95</sup> Of course this sort of case might be more or less convincing or strained, but the same is true of the argument that most of the major Warren Court decisions had roots in precedent. What the example shows is that any categorical distinction between precedent-using courts and memoryless legislatures, forever acting on a blank slate, is a cartoon.

5. *Past Judges and the Current Executive: Roosevelt and Condorcet.* — Some of the same considerations hold, with appropriate modifications, for executive branch decisionmaking. It is not clear, on Condorcetian grounds, that the aggregated information embodied in a line of precedent is superior to the information contained in executive branch decisionmaking. In a sense, the executive branch contains many more minds, at any given time, even than Congress, whose staff of twenty-odd thousand employees is dwarfed by the hundreds of thousands of (non-military) personnel employed by the executive. This is misleading because the internal organization of the executive branch is more hierarchical than that of American legislatures, which display relatively weak party discipline. In Condorcetian terms, this hierarchy increases intragroup deference and reduces the effective independence of the aggregated “votes.” Nonetheless, the executive branch is a they, not an it; the “unitary execu-

---

91. Strauss, *Common Law Genius*, *supra* note 27.

92. Pub. L. No. 93-205, 87 Stat. 884 (codified in scattered sections of 16 U.S.C.).

93. Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

94. Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).

95. See Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause?*, 69 *Brook. L. Rev.* 923, 933–41 (2004). The Endangered Species Act did break with the past in important ways, especially by applying to nonfederal lands, but it was not created out of thin air.

tive" is a legal claim about formal lines of authority and removal that does not describe executive decisionmaking and has no direct relevance to a Condorcetian analysis.

Because of the internal diversity of the executive branch and the multiplicity of its officials, it is an open question whether an executive decision aggregates more or less information than the decisions of judges in a regime of precedent. Executive branch policy analysts are, plausibly, highly competent in the sense that they are experts in particular fields. The harder question is how well executive expertise is actually used by decisionmakers higher in the chain; even if higher decisionmakers are sincere, and thus impose no political distortions on the analysts' conclusions, they must in many cases select between or among competing analyses, and may do so well or poorly. Here too, however, examining only the current executive understates the case; executive offices routinely use precedents, in the sense of prior decisions that are informationally useful whether or not legally binding. There is no basis for a systematic presumption that judicial precedent is informationally superior to executive decisions where these conflict.

6. *Implications and Conclusions.* — Overall, it is hard to generalize about the relative informational properties of common law precedents and traditions, the original decisions of framers and ratifiers, the decisions of current legislatures, of the current executive, and so forth. All one can offer are some comparative statics and institutional cautions. As to competence, the lower the average competence of past judges, and the higher the average competence of past framers or ratifiers, the less likely it is that current judges should override clear text based on contrary subsequent precedent. However, where circumstances change over time, the informational advantage of later judges will become pronounced. Much depends on the rate of change in the legal and political environment, a point I underscore in Part II below.

If the legal and political environment is changing rapidly, however, legislation is plausibly the best response of all. Here too some general comparative statics are possible. The lower the average competence of past judges, and the higher the average competence of current legislators, the less willing current judges should be to override current statutes on the basis of precedent. On numbers, even very competent judges today, possessed of precedents issued by very competent judges in the past, will rarely do well to overrule the decisions of current legislatures, just because of their sheer relative numerosity, which counts for a great deal in Condorcetian terms if average competence is greater than one-half (in the case of two choices).

These points are not useless, but they are not sharp tools either. However, the very fact that it is hard to make further progress along these lines, in the abstract, itself suggests some useful generalizations. First, common law constitutionalists must beware of a fallacious move from an

explicit and valid<sup>96</sup> comparison—that the aggregated wisdom of many judges or participants in a tradition, over time, is superior to that of one or a few judges exercising their unaided reason today—to an invalid implicit comparison—that the aggregated wisdom embodied in precedent is superior to that embodied in the constitutional text and original understanding, in statutes, or in the decisions of executive officials. The point is not to assert that the constitutional common law is or is not, in fact, superior to the alternative sources; it is that no amount of comparing one judge to many judges can supply the answer to the other institutional comparisons.

Second, the very weapons that common law constitutionalists deploy against originalism may be used against them by originalists, and can also be used against them with even greater effect by Thayerians, who can plausibly claim that an informational analysis plays directly to the comparative advantage of legislatures. By invoking Condorcet against the originalists, the common law constitutionalists tend to expose their flank. The first virtue of any theory of constitutional adjudication is to explain why courts should have the power to override legislative action. Originalism, for all its grievous theoretical problems on other margins, offers a straightforward account of that power: Courts may do so when and because there is a validly enacted higher source of law authorizing or requiring them to do so. By contrast the Condorcetian interpretation of common law constitutionalism, and of Burke, leaves it not at all obvious why judges should rely on precedent or even tradition to trump the views of current legislatures. The very plausible claim that many judicial minds are superior to one or a few does not give any leverage in making that additional, and more difficult, claim.

To make the implications of these points more concrete, some observations about different legal and institutional contexts are useful. Consider the following:

*“Burkeanism as a sword” versus “Burkeanism as a shield.”*<sup>97</sup> An implication of the foregoing is that there is no sound basis for using Burkeanism as a sword—meaning that there is no warrant for overriding the judgments of current legislatures or the executive by reference to precedent or judicial traditions. The most plausible consequence of the Condorcetian analysis is Thayerism. In this regime, legislatures might themselves be precedentialists and traditionalists, using the common law of past legislation, and broader social traditions, to inform new legislation. The overall regime would be one of *Thayerism for courts, common law constitutionalism for legislatures*.

Here we must be careful with the distinction between precedent (judicial traditions) and traditions more broadly. We have seen that, at the Supreme Court level especially, precedents may not embody the judg-

---

96. Assuming away the internal problems discussed in I.B.

97. Sunstein, *Burkean Minimalism*, *supra* note 5, at 356.

ments of very many minds, at least compared to legislatures. Social traditions, on the other hand, may stand on a better footing, if they incorporate the judgments of a large number of people. However, there are two problems with any attempt to distinguish precedent from tradition as guides to judicial decisionmaking. One quite fundamental problem, identified by Bentham, is that traditions are not self-defining or self-applying; if traditions are refracted through judicial decisions, then they have no better epistemic credentials than do the judges themselves, who may (inadvertently) distort or misconceive them in the process of identification and application.<sup>98</sup> The second problem, relevant especially in constitutional cases, is that legislators too can rely on broader social traditions, not just on legislative or judicial precedent. If judges can discern and apply social traditions that have strong Condorcetian credentials, so can legislators; and to the extent there are right answers about what traditions permit or require, highly numerous legislatures have a built-in Condorcetian advantage over courts in discerning those answers.

If Burkeanism as a sword is infirm, there is still a possible role for Burkean arguments that support legislative and executive judgments—Burkeanism as a shield. But this is not a very impressive role. Where constitutional texts are ambiguous and precedent points in the same direction as enacted legislation or executive rules, judges will uphold what the legislature or executive has done. Here there is no obvious problem, and no real need to defend common law constitutionalism as a distinctive approach to constitutional adjudication. Burkeanism as a sword is the theoretically crucial case for common law constitutionalism, but it is also the very case where Condorcetian reasoning most strongly suggests that judges—either current judges or a notional judiciary aggregated over time—should defer to other institutions.

*The Frankfurter canon.* Justice Frankfurter suggested that the decisions of past legislatures and presidents about how to allocate powers among themselves places a sort of common law gloss on ambiguous constitutional texts, especially in areas of separation of powers and foreign affairs, where the constitutional texture is especially open.<sup>99</sup> On the Condorcetian view, Frankfurter's point is either important or banal, depending upon whether it is assumed that there is or is not a line of judicial precedent that construes the constitutional ambiguity in a way different than the other branches.

If there is no such line of precedent, then on Condorcetian premises it is banal that current judges should rely on the implicit collective judgment of legislators and presidents over time. Those judgments will be made by a statistical group far more numerous, and at least as expert, as

---

98. Jeremy Waldron, *Custom Redeemed by Statute*, 51 *Current Legal Probs.* 93, 100 (1998) (“Bentham argued that once they come into the hands of the judges, customs tend to be ill-used and subjected to arbitrary and unpredictable modifications.”).

99. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

the small group of current judges. If there is a line of contrary precedent, however, Frankfurter's idea is more cutting. It suggests that the aggregated wisdom of many judges, over time, is still inferior to the aggregated wisdom of legislators and executive officials, over time. In this latter case, Frankfurter's view is a special case, in the area of separation of powers, of the claim that Burkean common law constitutionalism should not be used as a sword—at least not when Burkeanism is interpreted in informational terms.

*State legislatures and re-enactments.* Here is another special case of the same point. Suppose that at Time 1, Supreme Court Justices issue a precedent decision invalidating state laws. At Time 2, many states reenact those laws. Should the Court acquiesce at Time 3, or enforce its contrary precedent?<sup>100</sup> On Condorcetian grounds, the answer is (almost certainly) that the Court should acquiesce. Assume, however heroically, that state legislatures and the Court are addressing the same question at all times—whether a given state statutory rule complies with the federal Constitution—and that there is a right answer to this question. The aggregated current judgments of a massive number of state legislatures are superior, in terms of the Jury Theorem, to those of the group comprising the judges and Justices who sat in the precedent case(s). It is irrelevant that the legislators' judgments are themselves sorted into groups (state legislatures) who make separate collective decisions under internal majority rule. The Jury Theorem applies even to the purely notional and statistical group comprised of all the state legislators taken together, so long as the Theorem's other conditions are met.

In general, Condorcetian reasoning does not supply a convincing interpretation of common law constitutionalism, particularly the latter's explicitly Burkean claim that the limits of human reason support reliance on constitutional precedent and tradition. The internal problem is simply that the Jury Theorem's conditions will, quite often, not apply to any realistic description of the process of common law constitutionalism. The comparative institutional problem is that Condorcetian reasoning itself defangs common law constitutionalism in the most theoretically crucial cases—where precedent is used to trump clear constitutional text and history, or to trump the judgments of current legislatures and executive officials. On Condorcetian grounds, the most plausible regime would be one of Thayerian, highly deferential courts, with common law constitutionalism entrusted to legislatures. The point is that the views of many past judges embody more latent information than the views of a few judges sitting today may be correct, but that is not the relevant comparison in the testing cases.

---

100. For an example of this issue, compare *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (invalidating Georgia and Texas death penalty schemes), with *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (validating death penalty after state reenactments of new schemes).

## II. BURKE AS DARWIN

I will now turn from informational accounts of common law constitutionalism to evolutionary ones.<sup>101</sup> The Condorcetian interpretation of Burke assumes the existence of exogenous right answers, somehow defined, in constitutional cases; posits that judges are sincerely attempting to find those answers; and posits that judges are more likely to find those answers by relying on common law precedents than on their “private stock of reason.” In the evolutionary interpretation, by contrast, no judge need be seeking to produce right answers. Different judges have different motivations, ideologies, and biases. Nonetheless, the claim runs, some mechanism causes the uncoordinated action of biased judges to produce a body of common law that is economically efficient. If such a mechanism exists, it would be a species of invisible hand explanation, in which efficiency would arise from human action but not from human design.<sup>102</sup>

What is the evolutionary mechanism exactly? A selection mechanism requires variation in the relevant population (of organisms or cases); heritability, so that favored variations can be maintained in the population when they arise; and differential reproductive advantage (or “fitness”), meaning that favored variations are likely to replace competitors.<sup>103</sup> In evolutionary analyses of the common law, the first requirement is typically said or assumed to be satisfied by variation in the biases or preferences of judges or litigants, while the second is satisfied by the force of precedent. However, the third requirement is the most problematic; here the analogy to Darwinian processes becomes particularly obscure. What mechanism corresponds to natural selection of relatively fitter organisms?

The most familiar attempt to answer this question involves the demand-side models of common law evolution that have been prominent in law and economics. Here “demand-side” means that the common law’s claimed evolution toward efficiency is powered by the selection of cases for litigation—by litigants’ decisions about what cases to appeal or set-

---

101. For the evolutionary interpretation of Burke, see, e.g., Strauss, *Common Law Interpretation*, supra note 5, at 879 (arguing for a “form of traditionalism, characteristic of the common law method, [that] calls for recognizing the value of conclusions that have been arrived at, over time, by an evolutionary process”); Sunstein, *Burkean Minimalism*, supra note 5, at 368 (“Burkeans might stress not social practices but the slow evolution of judicial doctrine over time . . . . For these Burkeans, what is particularly important is the *judiciary’s* prior judgments, which should in turn be based on a series of small steps, and should avoid radical departures.”); Young, supra note 5, at 653–56 (offering evolutionary interpretation of Burke and connecting “Burke’s theory of reform” to “the common-law tradition of evolutionary change”).

102. This is a paraphrase of Adam Ferguson’s famous observation that “nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.” Adam Ferguson, *An Essay on the History of Civil Society* 119 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1767).

103. See Robert N. Brandon, *Concepts and Methods in Evolutionary Biology* 47 (1996) (defining natural selection according to these criteria).

tle.<sup>104</sup> I will examine both internal and institutional problems with the demand-side models. First, as an internal matter, these models suffer from a kind of fragility; they are not robust against slight changes in the assumptions. Second, in comparative institutional terms, there is no straightforward way to transpose these models to the setting of constitutional common law. Even if constitutional common law tends to evolve toward efficiency, and even if it is desirable that constitutional common law be efficient, legislation may also tend toward efficiency, and for the same reasons. Moreover, in a rapidly changing environment, legislation may at any given moment be more efficient than constitutional common law, even if the latter systematically tends toward efficiency while the former does not. In parallel to the argument of Part I, the attempt to interpret Burke by way of Darwin leads most naturally to James Bradley Thayer's idea that courts should systematically defer to legislatures in constitutional matters.

#### A. Demand-Side Models: Internal Problems

I will not attempt a comprehensive overview of this massive literature.<sup>105</sup> Instead I will single out two relevant problems with the demand-side models: the fragility of their assumptions, and their silence about the rate at which common law precedents converge to efficiency. The former problem is better known, but the latter is even more serious, because it suggests that in rapidly changing environments the tendency of common law to converge to efficiency—even assuming it exists—will not matter very much; in particular, it will provide no comparative advantage over legislation.

1. *Fragility.* — The basic engine of the demand-side models is selection pressure by litigants: If inefficient precedents are challenged more frequently, while efficient precedents are more often left in place, the law will tend to efficiency over time. The basic aspiration of the literature is to propose mechanisms that will show why, and under what conditions, litigants will tend to differentially litigate inefficient precedents. In the model that inspired much of the work in this area, the basic idea is that inefficient precedents inflict deadweight losses; the losers will thus have an incentive to pay more to attack the precedents than their beneficiaries

---

104. For supply-side analysis based on competition among institutions providing legal rules, see generally Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 *Nw. U. L. Rev.* 1551, 1620 (2003) [hereinafter Zywicki, *Rise and Fall*] (arguing that competition among different courts with overlapping jurisdictions during formative era of common law “led to innovation and incentives to provide efficient legal rules”). Zywicki also argues that an increase in the strength of precedent in the nineteenth century exacerbated various problems with the common law, such as rent seeking. See *id.* at 1565.

105. For a recent summary, see Paul H. Rubin, *Why Was the Common Law Efficient?* 2–9 (Emory Law & Econ. Research Paper Series, Paper No. 04-06, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=498645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=498645) (on file with the *Columbia Law Review*).

will pay to defend them.<sup>106</sup> Many second-decimal refinements have been proposed, but the underlying ideas are similar, so I will call this the “basic model” and take it as the subject of discussion.

The basic model has been subjected to several major lines of critique within a broadly rational choice framework.<sup>107</sup> First, the basic model assumes that precedents can only be reaffirmed or overruled. If they can also be further entrenched, however, then differential litigation might actually tighten the grip of inefficient precedents on the law.<sup>108</sup> Second, the basic model assumes that all classes of litigants have, on average, equal stakes and an equal interest in the future consequences of precedent. But if different classes of litigants are differentially organized, perhaps because they have systematically different stakes or because some are repeat players while others are single-shot litigants, then precedent can just as well evolve in inefficient directions.<sup>109</sup> There may be eventual convergence, but to rules favoring organized groups, not rules favoring efficiency.

In general, rent-seeking litigation is as much a problem for models of common law efficiency as rent-seeking lobbying is for models of legislative efficiency,<sup>110</sup> a point I will return to shortly. According to one historically-inflected version of this hypothesis, common law was efficient in the eighteenth and nineteenth centuries, but is no longer so, because of the large-scale organization of rent-seeking litigation groups<sup>111</sup> or (in a supply-side version) because of the decline in competition by different court systems.<sup>112</sup> The basic model can and has been refined to try to account

---

106. Paul H. Rubin, *Why is the Common Law Efficient?*, 6 *J. Legal Stud.* 51, 53 (1977) [hereinafter, Rubin, *Why Efficient?*]; see also George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 65 (1977).

107. For a critique drawing on behavioral economics, see Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 *Fla. St. U. L. Rev.* 425 (2005); for a different critique, see Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 *Geo. L.J.* 583, 616 (1992) (arguing that claims about efficiency of common law are based on “a weak concept of efficiency”). I will bracket such issues in the discussion here.

108. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235, 273 (1979).

109. The authors of the basic model recognized this point. See Rubin, *Why Efficient*, *supra* note 106, at 53–57.

110. See Gordon Tullock, *The Case Against the Common Law* 15 (1997) (arguing that entire legal system is influenced by interest groups); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 34 (1991) (arguing that “[t]he litigation process cannot be treated as exogenous to interest group theory because that process is also subject to forms of interest group influence”).

111. See Tullock, *supra* note 110, at 52; Paul H. Rubin, *Common Law and Statute Law*, 11 *J. Legal Stud.* 205, 211–19 (1982) [hereinafter, Rubin, *Common Law and Statute Law*].

112. See Zywicki, *Rise and Fall*, *supra* note 104, at 1620–21.

for these critiques, but only by making more stringent the conditions under which precedent converges to efficiency.<sup>113</sup>

After some thirty years of discussion, the fairest assessment is that the thesis of common law efficiency (at least as driven by demand-side effects) should best be taken as a possibility, no more. Under imaginable conditions the common law will systematically tend to converge toward efficiency. However, slight changes in the initial assumptions seem to produce large effects, driving the implications of the models hither and yon and leaving the basic thesis unresolved. The natural response is to call for some facts; in the abstract, however, it can at least be said that the mechanisms in view are insufficiently robust to inspire any confidence.

2. *Environmental Change.* — Suppose the basic demand-side mechanism is not fragile, but robust, and ignore comparative institutional questions, which I shall take up shortly. What implications does the basic model have? Surprisingly few, for a simple reason that has not been much discussed in the literature. Efficiency is always relative to the constraints established by the relevant environment. In the economic sense, in which all economic factors are put to their highest-value use and all Pareto-improving trades are consummated, these constraints arise from available resources and technology (parametric constraints) and from competition by other economic actors (strategic constraints). In the biological sense, the optimal adaptation of organisms is determined by natural resources and competition from other organisms.

The consequence is the following. The claim that some population—of organisms or cases—evolves *toward* efficiency is importantly different than a claim that the population *reaches* efficiency. A crucial variable is the relative rate of change in the population, compared to the environment. If the environment changes slowly, relative to the process of adaptation, organisms will be well-adapted given the constraints. But if the environment changes quickly, relative to the speed of adaptation, then at any given moment most of the relevant population may be poorly adapted.<sup>114</sup> Thus an important general argument against institutional analogues of natural selection is that the rate of change in the political and social world is, in general, much faster than in the natural world. Against the background of a natural environment that is relatively stable over periods of millions of years, it is plausible to proceed on the assumption that most extant organisms are well-adapted. In institutional settings such as the market, however, the higher rate of environmental change means that many extant firms may be poorly adapted at any given time, even if there is strong pressure toward efficiency.

An analogous problem arises here. Nothing at all in the demand-side models implies, in and of itself, anything about (1) the rate at which

---

113. See, e.g., Keith N. Hylton, Information, Litigation, and Common Law Evolution, 8 Am. L. & Econ. Rev. 33, 57 (2006).

114. See Jon Elster, Ulysses and the Sirens 6 (rev. ed. 1984).

the common law converges to efficiency or (2) the rate of change in the background social, economic, and policy environment against which efficiency must be judged. If the speed of convergence is slow, relative to the rate of change in the background environment, then even a systematic tendency toward efficiency will not guarantee that most common law rules are efficient. Indeed, if the rate of environmental change is high, many or most common law rules might be inefficient at any given time, even if the pressure toward efficiency is powerful.

I have indicated the conditions under which the common law might tend toward or reach efficiency; although it is hard to know in the abstract whether or not those conditions hold, there are no real grounds for confidence that they do. A central point is that the standard demand-side models, even if robust, carry no implication at all that most common law rules will be efficient at any given time. One must also compare the rate at which common law tends to efficiency with the rate of environmental change.

The implication is that the thesis of common law efficiency is most plausible in and for periods in which the rate of economic, technological and political change is relatively slow, but is less plausible where change proceeds relatively rapidly. Above, I mentioned the thesis that the common law was efficient in the nineteenth century but has since ceased to be so, because of the rise of organized litigation groups or the decline of supply-side competition among legal systems. The current conjecture is in the same family, although the mechanism involves the relative rates of change in the common law and the background environment. Perhaps Burke's dictum, interpreted in evolutionary terms, offered a plausible account of common law efficiency in England in the seventeenth and eighteenth centuries, because the common law had time to evolve close to efficiency in a relatively stable environment. Even if so, there is no reason to think that the common law is efficient in other times and places, such as today.

#### B. *Demand-Side Models: Constitutional Implications?*

In this section, I will examine the question whether the demand-side models of common law efficiency, even if internally robust, have any pay-off for constitutional law. In general, they do not. First, it is familiar that efficiency is a dubious normative goal for constitutional law. Second, the basic demand-side model uses essentially the same mechanism—the willingness of regulated parties to bid more to avoid deadweight losses—that powers the standard model of legislative efficiency. The basic model thus offers no convincing reason to assume that judicial precedents will converge to efficiency while legislation does not. Third, even if legislation has no systematic tendency to converge to efficiency, legislation can respond more quickly to a changing environment. Perhaps the common law is always tending toward efficiency, yet it may nonetheless at any given

moment be farther away from the optimum than is the body of legislation at the same moment.

1. *Should Constitutional Law Be Efficient?* — Efficiency is a deeply controversial general goal for constitutional law. I will only touch upon the relevant issues here, both because the point is familiar,<sup>115</sup> and because it yields only an external critique of the premises of the evolutionary interpretation of Burke, rather than an internal critique of the interpretation's logic.

One well-known set of problems involves the moral status of efficiency. If efficiency is equated with wealth maximization, there is the major problem that wealth, in itself, is not a value.<sup>116</sup> If efficiency is equated with either Pareto optimality or satisfaction of the Kaldor-Hicks criterion, under which winners gain more than losers lose, distributive concerns come to the fore.<sup>117</sup> These questions about the moral status of efficiency do not apply, at least in the same way, to efficient common law in the subconstitutional sense. Where the subconstitutional common law is efficient, but there are no constitutional constraints, any desired redistribution can take place through the tax and transfer system; doing so will itself be the efficient means of redistribution.<sup>118</sup> However, if constitutional common law is used to block redistributive transfers that are inefficient but (arguably) required by justice, then the dubious moral status of efficiency is consequential.

One might sidestep or dilute these problems by distinguishing between or among different constitutional provisions. Perhaps efficiency should be the goal of constitutional law under the Takings Clause, but not under the Due Process Clauses. Yet nothing in the evolutionary model of the common law is tied to these textual and doctrinal differences; the relevant mechanisms are not sufficiently fine-grained to accommodate them. Those differences could only be taken into account under an intentional model, in which judges purposefully promote efficiency, either because they have an intrinsic taste for it, or because public pressures force them to do so.<sup>119</sup> An intentional model of this sort, however, would no longer be Burkean in any obvious sense; it belongs to the realm of deliberate social engineering, by judges, that Burkeans deride as

115. The best discussion is Elhauge, *supra* note 110, at 48–66.

116. See generally Ronald Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191 (1980) (arguing that wealth cannot be understood as a value).

117. See Shaun Hargreaves Heap et al., *The Theory of Choice* 241–42 (1992).

118. See Louis Kaplow & Steven M. Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667, 674–76 (1994).

119. See Richard A. Posner, *Economic Analysis of Law* 99 (1st ed. 1972) (“In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use.”). For a critique of the intentional version of the common law efficiency thesis, especially as applied to public law, see Frank I. Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. Legal Stud. 431 (1980).

“innovation.” Nor, of course, would an intentional model be Darwinian either.

2. *Legislative Efficiency? Thayer as Darwin.* — Suppose, however, that the goal of constitutional law is in general to promote efficient law. Suppose also that a line of constitutional common law decisions have established a certain rule, and that a course of legislation produces a statute conflicting with the constitutional common law rule. It does not follow that the judges would best promote efficiency by invalidating the statute on constitutional grounds. The very premises suggesting that the common law tends toward efficiency also suggest that legislation tends toward efficiency.

Recall that the mechanism driving the basic model of common law efficiency is that inefficient precedents inflict deadweight losses, and that the parties who suffer those losses will have greater incentives to attempt to overturn them than their beneficiaries will have to defend them (assuming equal stakes). Over time, inefficient precedents will be challenged more often and more frequently overturned. This model is, however, essentially the same as a standard model suggesting that legislation will be efficient, and for the same reasons.<sup>120</sup> In this model, “pressure groups” who suffer deadweight losses from inefficient legislation will spend more to overturn such laws than their beneficiaries will spend to defend them. Despite the status quo bias of the legislative process, which favors groups defending inefficient legislation, the systematic tendency over time will be toward an efficient corpus of legislation. The parallel between this model and the basic model of common law efficiency was clear to all, right from the beginning.<sup>121</sup>

Both the basic model of common law efficiency and the standard model of legislative efficiency assume equal distribution of stakes across groups. Accordingly, the standard model of legislative efficiency has often been questioned by public choice theorists who posit differential organization by groups with unequally distributed stakes in legislative outcomes; such groups will seek and obtain inefficient legislation, and those who suffer the deadweight losses of such legislation will be insufficiently organized to resist.<sup>122</sup> But what is sauce for the goose is sauce for the gander. The same groups will also enjoy their organizational advantages

---

120. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. Econ. 371, 375 (1983).

121. See Rubin, *Common Law and Statute Law*, supra note 111 (controlling for change over time, common law is not systematically more efficient than statute law); Rubin, *Why Efficient*, supra note 106, at 61 (discussing parallels between efficient legislation and efficient common law).

122. See generally Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 141–48 (1965).

in the adjudicative process,<sup>123</sup> including the process of common law constitutionalism.<sup>124</sup>

Common law constitutionalists have attempted to draw nonarbitrary distinctions between legislative and adjudicative processes in ways that favor the latter. To date none are convincing. Consider the argument that the minimum bid—the minimum a group must pay to become a player in the lawmaking game—is lower in the courts than in the legislative process, while the marginal benefits of incremental expenditures tend to be higher in legislatures than in courts; both points are intended to show that well-funded groups have a greater advantage in legislatures.<sup>125</sup> Among other problems with this argument,<sup>126</sup> however, the point about marginal benefits of expenditures undermines the basic mechanism that is supposed to drive the common law to efficiency. If litigation expenditures quickly reach a point of zero marginal benefit, then it will not matter that parties suffering deadweight losses would be willing to pay more to challenge inefficient precedents than the beneficiaries would be willing to pay to defend them, because the extra expenditures will have no positive effect on the likelihood of overturning the inefficient precedents.

3. *Efficiency and Social Change.* — Putting aside the foregoing points, let us suppose now that efficiency is a plausible general goal for constitutional law, that judicial decisions systematically tend toward efficiency, and that legislative decisions do not. It still does not follow that judges will best promote efficiency by invalidating statutes that conflict with a contrary line of precedent.

The further problem is that if the background environment is changing rapidly, the legislation in force at any given time may well be more efficient than contrary precedent. Although the latter systematically tends toward efficiency at all times, it never attains it at any point, because the environment creates a moving target. New legislation has no dynamic tendency toward increasing efficiency over time (we are supposing), but may simply start at a higher level of efficiency than the common law rules in place at a given moment, which were developed in a previous environ-

---

123. See Elhauge, *supra* note 110, at 34; see also Frank B. Cross, *The Judiciary and Public Choice*, 50 *Hastings L.J.* 355, 360–68 (1999); Lewis A. Kornhauser, *Legal Foundations of Economic Analysis of Law* 15–16 (May 31, 2006) (unpublished manuscript, on file with the *Columbia Law Review*), available at [http://www.law.nyu.edu/clppt/program2006/readings/D\\_N\\_W\\_colloquium\\_excerpt.pdf](http://www.law.nyu.edu/clppt/program2006/readings/D_N_W_colloquium_excerpt.pdf).

124. See Pritchard & Zywicki, *supra* note 25, at 494–501 (discussing rent seeking through Supreme Court litigation and decisionmaking in constitutional cases).

125. See Merrill, *Public Choice*, *supra* note 4, at 221–22 (arguing that there is greater “minimum bid limitation” for legislature than judiciary); cf. Todd J. Zywicki, *Gordon Tullock’s Critique of the Common Law* 46 (George Mason L. & Econ. Research Paper No. 07-13, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=964781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964781) (on file with the *Columbia Law Review*) (discussing differences in “rent-seeking pressures” on legislature and judiciary).

126. For further discussion, see generally Cross, *supra* note 123.

ment and now suffer from obsolescence. This is a short-run advantage of legislation that dissipates as the common law evolves toward efficiency in the new environment; but if further environmental change ensues, the common law may never catch up. Where environmental change is rapid, a series of short runs is all there is. This is an evolutionary parallel to the Benthamite argument, discussed in Part I, that legislatures systematically tend to have more current information, and thus better information overall, even if judicial decisions more effectively aggregate the information past judges possessed.

The superior efficiency of legislation in a rapidly changing environment is merely a possibility. Everything depends on the relative rates of change in three variables: the common law, the body of legislation, and the background political and economic environment. But the possibility blocks any direct inference from the joint premises that (1) the common law tends toward efficiency and (2) legislation does not, to the conclusion that (3) judges who aim to promote efficiency should use constitutional common law to override statutes.

I conclude that the evolutionary interpretation of Burke, like the informational interpretation, has few useful implications for constitutional law. If this is so, then two conclusions are possible. The minimum conclusion is that the recent and sophisticated arguments for Burkean constitutionalism based on the limits of reason are a dead end. If no other arguments for Burkean constitutionalism are forthcoming, then a stronger conclusion follows: Burke's dictum is an insight that cannot usefully be cashed out in constitutional law. From the point that judges do better to draw upon the "bank and capital of ages" rather than their "private stock of reason," not much follows.

### C. *Supply-Side Models: The Cardozo Theorem*

To round out the picture, I will examine some recent economic models that might easily be adapted to support a version of common law constitutionalism. These models have recently been developed by economists Nicola Gennaioli and Andrei Shleifer. The foundation for their approach is the "Cardozo Theorem":

The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.<sup>127</sup>

---

127. Cardozo, *supra* note 57, at 177. The Cardozo Theorem is named, and discussed, in Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 *J. Pol. Econ.* 43, 44, 60–61 (2007) [hereinafter Gennaioli & Shleifer, *Evolution of Common Law*]. A companion paper is Nicola Gennaioli & Andrei Shleifer, *Overruling and the Instability of*

As Cardozo's dictum focuses on the behavior of judges and not that of litigants, Gennaioli and Shleifer use it to develop supply-side models of legal change, in contrast to the demand-side models discussed previously.<sup>128</sup> Their models combine an information aggregation approach with an evolutionary approach: Their premise is that convergence to efficiency occurs only in the restricted sense that efficient use is made of all possible information possessed by the relevant pool of judges. In the best case, the unintended byproduct of countervailing judicial biases is that all material distinctions are built into the body of legal rules, and the law becomes increasingly precise.<sup>129</sup>

Whatever its merits as a picture of the evolution of ordinary common law, the Cardozo Theorem cannot be used to support any robust version of the constitutional common law, or so I will argue. To date, models based on Cardozo's dictum posit an excessively sharp distinction between overruling and efficiency, one that is an artifact of the modeling strategy. Moreover, convergence to efficiency (and indeed convergence of any sort) is least likely to occur in these models when the polarization of judicial views is high, perhaps because of the politically controversial character of the subject. And ideological polarization across judges is a chronic circumstance of modern constitutional adjudication, at least at the level of the Supreme Court.

To be clear, neither economists nor legal scholars have yet drawn upon this new work to argue for the efficiency of common law constitutionalism as opposed to the subconstitutional common law. What follows is therefore in the nature of a preemptive discussion, justified by the close connections between the Burkean and Cardozean approaches. It is inevitable that sooner or later—probably sooner—someone will attempt to arbitrage these models into law generally and constitutional law in particular. It is sensible to begin to consider their implications.

As before, I both raise internal questions about these models and examine their implications for constitutional law. Internally, the models currently presuppose a sharp distinction between overruling and distinguishing, but that distinction is untenable. As for implications, the chronic circumstances of constitutional law—especially its politically polarizing character—make it unlikely that convergence to efficiency will occur in constitutional settings, according to the models' internal logic.

---

Law, 35 *J. Comp. Econ.* 309 (2007) [hereinafter Gennaioli & Shleifer, *Overruling and the Instability of Law*].

128. Although Gennaioli and Shleifer do consider how their model of overruling can be extended to incorporate demand-side effects, they do not do so for their model of distinguishing. See Gennaioli & Shleifer, *Overruling and the Instability of Law*, *supra* note 127, at 320–22. In any event, the distinctive and novel feature of their approach is the focus on the supply side—on efficiency as the unintended byproduct of uncoordinated decisionmaking by a series of biased judges over time.

129. See Gennaioli & Shleifer, *Evolution of Common Law*, *supra* note 127, at 62.

1. *Overruling, Distinguishing, and Constitutional Law.* — To date, the Cardozoan models presuppose a distinction between two mechanisms of common law change: the overruling of cases and the distinguishing of cases.<sup>130</sup> In these models distinguishing, but not overruling, tends toward efficiency,<sup>131</sup> although in both cases a high degree of polarization across judges will dampen those tendencies. These results arise from the analytic setup. In the model of distinguishing, all judges are assumed to be more or less biased in one direction or another—too much liability or too little, relative to optimal liability. When Case 1 is decided in a way that conflicts with the biases of the judge sitting to decide Case 2, the Case 2 judge may distinguish the precedent, but only on relevant or material dimensions. If in Case 1 the court held that dog owners are always liable when strangers are bitten, then in Case 2 the court may distinguish the Case 1 precedent by modifying the rule to say that liability does not attach when the dog was leashed. But the Case 2 court may not say that liability does not attach because the bite occurred on a Tuesday.

The result is that distinguishing cases over time adds material dimensions to the law, and this is a kind of extra information that adds precision to legal rules; each judge who distinguishes a prior precedent contributes a portion to the law's increasing precision over time.<sup>132</sup> Under certain conditions, judges' differing biases wash out and the benefits of increasing precision are all that is left. Most optimistically, the law may even converge to an efficient regime in which rules are maximally precise, so that the social losses from failing to sort between materially unlike cases are minimized. However, we will soon see that the conditions under which this occurs are stringent and especially unlikely to obtain for constitutional (as opposed to ordinary) common law.

The overruling model is different. "Since overruling, unlike distinguishing, does not bring new material dimensions into the law, it leads to the volatility of legal rules without a tendency to improve the law over time. With overruling, there is no benefit of legal evolution."<sup>133</sup> Where polarization among judges is high, the legal rule will never converge to a stable state (let alone an efficient stable state); rather it will fluctuate between extremes. Convergence to efficiency can only occur in the special case in which unbiased judges are more likely to vote to overrule prece-

---

130. Distinguishing is addressed in Gennaioli & Shleifer, *Evolution of Common Law*, supra note 127, at 43. Overruling is addressed in Gennaioli & Shleifer, *Overruling and the Instability of Law*, supra note 127, at 309.

131. Tends toward efficiency, but is unlikely to converge to full efficiency. Gennaioli and Shleifer do not claim that distinguishing produces the full efficiency of judge-made law. Rather, they make the weaker claim that legal evolution is beneficial on average, because "the informational benefit of distinguishing improves the quality of the law." Gennaioli & Shleifer, *Evolution of Common Law*, supra note 127, at 47.

132. See *id.* at 54–56.

133. *Id.* at 62–63.

dents than biased judges and in which the degree of polarization is only intermediate<sup>134</sup>—an “implausibly stringent” set of conditions.<sup>135</sup>

The Cardozoan models thus draw a sharp contrast between a regime of distinguishing, in which common law evolution is beneficial on average under a wide range of conditions, and a regime of overruling, in which common law is volatile and converges on efficiency only under very unlikely conditions. However, this contrast is an artifact of the modeling setup. In these models, material distinctions count as “distinguishing,” whereas immaterial ones do not; they are automatically classified as a form of overruling. But common law theory recognizes that the sheer accumulation of *material* distinctions can itself amount to a form of overruling. Cases are sometimes widely recognized as having been “distinguished to death,” such that all lawyers realize they have been implicitly overruled or “limited to their facts.” Moreover, common law theorists show that judges often implement their biases precisely by distinguishing precedents based on immaterial or irrelevant dimensions—by holding that dog owners are safe if the bite occurred on a Tuesday.<sup>136</sup>

It is true that from the standpoint of the individual judge, using material distinctions will be strictly preferable to using irrelevant distinctions; the former, unlike the latter, both allows the judge to indulge her biases and also supplies beneficial information. But this holds only “until material dimensions are exhausted.”<sup>137</sup> The qualifier is critical. In the constitutional common law (and perhaps also in ordinary common law), the limits of materiality are quickly reached.

Consider the bewildering series of distinctions that proliferate in the Supreme Court’s jurisprudence of state sovereign immunity under the Eleventh Amendment,<sup>138</sup> where at present states can be sued in federal court for equitable relief but not for damages, unless Congress has clearly said otherwise, but only under its power to enforce the Fourteenth Amendment rather than (say) the Commerce Clause, or unless the United States rather than a private party is the plaintiff, and so on.<sup>139</sup> The process that led to this patchwork of rules is one of Justices advancing distinctions that were immaterial, given the prior law, and embedding them in the new legal rules. Remarkably, proponents of all competing views of the Amendment seem to agree that the current rules are wrong,

134. See Gennaioli & Shleifer, *Overruling and the Instability of Law*, *supra* note 127, at 317–18 (Proposition 4).

135. *Id.* at 323.

136. See Karl N. Llewellyn, *The Common Law Tradition* 287 (1960) (“‘[A] distinction without a difference’ is a stench . . .”).

137. Gennaioli & Shleifer, *Evolution of Common Law*, *supra* note 127, at 61 n.8.

138. I use “Eleventh Amendment” only as a shorthand, bracketing the question whether the Court is here developing a body of law rooted in the Amendment’s text or rather in background structural principles of federalism.

139. For an overview of these “complex and often counterintuitive interpretations” of the Eleventh Amendment, see 1 Laurence H. Tribe, *American Constitutional Law* 519–66 (3d ed. 2000).

given their own views; all that keeps the current rules in place, despite being no one's first choice, is that there is no agreement on what set of rules should replace them. Perhaps a regime of rules that are everyone's second choice satisfies as many people as much as possible, and is thus efficient in one sense, but the process of adding cynical distinctions does not plausibly enrich law's informational content.

2. *Cardozean Constitutionalism?* — Apart from the internal logic of the models, their main implication is that constitutional common law should be both highly volatile and far from efficient. One key variable is the effect of judicial polarization—the distance between the views of different judges—on the shape and pace of legal change. Cardozo's hope that “the eccentricities of judges balance one another” and yield a type of “constancy” in the law turns out to be optimistic. As Gennaioli and Shleifer explain, in a regime of overruling, when polarization is high, the common law will simply fluctuate or vacillate from one polar view to another; not only will the law not converge to efficiency, it will never converge at all.<sup>140</sup>

Vacillation between polar views is a well-known effect of overruling in the constitutional common law. Consider the sequence from *National League of Cities v. Usery*,<sup>141</sup> which announced constitutional protection for the “essential functions” of state governments, to *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>142</sup> which overruled the earlier precedent—with the dissenting Justices issuing a warning that the wheel would turn yet again.<sup>143</sup> As it turned out the dissenters, when they obtained a majority, did not reinstate *National League of Cities*, but they did press forward with alternative federalism-protecting doctrines, such as the law of state sovereign immunity discussed above, and the principle that states cannot be commandeered into enacting or enforcing a federal regulatory program.<sup>144</sup>

In a regime of distinguishing without overruling, Cardozo's conjecture does better, because legal change through distinctions adds information that overruling does not. Even with high polarization, distinguishing always adds precision to the law, and *some* degree of polarization is affirmatively beneficial, because it induces distinctions in cases where unpolarized judges would simply acquiesce in whatever decision was first issued. Although not all extant rules will be efficient at any point, the average tendency of common law over time will be toward efficiency.<sup>145</sup>

140. See Gennaioli & Shleifer, *Overruling and the Instability of Law*, *supra* note 127, at 324.

141. 426 U.S. 833, 850–52 (1976).

142. 469 U.S. 528, 557 (1985).

143. See 469 U.S. at 580 (Rehnquist, J., dissenting); 469 U.S. at 589 (O'Connor, J., dissenting).

144. *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

145. See Gennaioli & Shleifer, *Evolution of Common Law*, *supra* note 127, at 60–62.

On the other hand, high polarization does reduce the benefits of the distinguishing process, because greater bias causes each judge to use cruder and less informative distinctions.<sup>146</sup> When polarization passes a certain threshold, the judge-made law tends less strongly to efficiency and may even become less efficient, because the costs of polarization outstrip the benefits; in other words, there is “an inverted U-shaped relationship between polarization and the efficiency of judge-made law.”<sup>147</sup> The upshot is that

the evolution of common law would produce most socially efficient results in the areas of law where there is room for change and updating, but where the disagreement among judges is not extreme. The relatively apolitical yet still changing areas of law, such as contract and corporate law, are the likely candidates for relatively efficient outcomes resulting from the decentralized evolution of judge-made law. In the extremely political areas of law, by contrast, the likelihood that the law gets stuck on a wrong trajectory is higher.<sup>148</sup>

This conclusion implies that Cardozo’s dictum is least likely to justify the constitutional common law—especially the highly polarizing constitutional common law governing rights and liberties—which is precisely where many common law constitutionalists want to stake their claims.<sup>149</sup> Here some qualifications are necessary. A large set of constitutional controversies are easy, noncontroversial, or unpolarizing.<sup>150</sup> The subset that are litigated (and the sub-subset litigated to the Supreme Court) are more likely to be highly polarizing, although not uniformly so. Moreover, structural constitutional law is often, perhaps on average, less polarizing than the constitutional law of rights and liberties. When all the qualifying is done, however, the comparative point remains: Taken together and on average, constitutional cases are more polarizing than the ordinary common law. Relative to ordinary common law, constitutional law is more pervasively concerned with distribution rather than coordination or cooperation; the scope for common interest (somehow defined) in the rules governing contract, property, and tort is greater, while the scope for common interest (somehow defined) in the rules governing abortion, or gay marriage, or free speech in wartime is less.

Although I believe this claim will be intuitively plausible to constitutional lawyers, it is hard to find direct evidence either for or against it. However, we may provide indirect support for the intuition by observing that issues are often constitutionalized precisely when, and because, they

146. See *id.*

147. *Id.*

148. *Id.* at 61–62.

149. See, e.g., *Poe v. Ullmann*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (discussing scope of “liberty” guaranteed by Due Process Clause of Constitution).

150. Cf. Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 407 (1985) (arguing that constitutional provisions that are rarely litigated are still important part of constitutional law).

are polarizing. Partisan entrenchments, in which an outgoing coalition attempts to constitutionalize a favored policy to bind the hands of successors, are routine.<sup>151</sup> And nonjudicial institutions will sometimes affirmatively support or encourage the judges to resolve controversial issues through constitutional review,<sup>152</sup> precisely because those issues are so polarizing that legislators on all sides hope to duck responsibility or to make a political target of the judges.

#### CONCLUSION

Much of this essay has been critical, aiming to express skepticism about recent arguments for common law constitutionalism that draw upon sophisticated social-scientific models of precedent. However, I also hope the critique has constructive byproducts, at both the methodological and the substantive level. Methodologically, I have offered a positive interpretation of the project of common law constitutionalism, as an attempt to provide social-scientific underpinnings for Burke's loose reflections on the limits of human reason, while also translating Burkean views to the constitutional setting. So too I have attempted to update Bentham's critique of the constitutional common law, adapting it to the distinctive setting of the constitutional common law. Even if the critique of common law constitutionalism offered here fails, it is affirmatively useful to translate the common law's historic competitor into the constitutional setting.

Substantively, I have suggested that the informational and evolutionary mechanisms canvassed above lead most naturally, not to Burke, but to James Bradley Thayer—to extensive judicial deference to legislative enactments. To the extent that informational and evolutionary mechanisms yield insights about the conditions under which courts should trump legislation on the basis of constitutional precedent, those conditions are predictably very narrow. The first virtue of any theory of constitutional adjudication is a theory of judicial review—of judicial power to override legislative commands. But the very mechanisms that common law constitutionalists invoke in praise of constitutional precedent cast legislation in a better light still. If many judicial minds are better than one or a few, many legislative minds are plausibly best of all.

---

151. See, e.g., Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am. Pol. Sci. Rev.* 511, 521 (2002) (describing Republican Party's successful efforts to entrench its policy agenda in courts during late nineteenth century).

152. See Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 *Am. Pol. Sci. Rev.* 583, 591–93 (2005) ("When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves.").