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## The Syndrome of the Efficiency of the Common Law

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# THE SYNDROME OF THE EFFICIENCY OF THE COMMON LAW

Nuno Garoupa\* & Carlos Gómez Ligüerre\*\*†

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## ABSTRACT

Our article is a methodological critique of the recent legal origins literature. We start by showing that the legal origins literature cannot easily be based on the efficiency hypothesis of the common law. By debunking the relationship between the efficiency hypothesis and the legal origins literature, we are left with no consistent theory to explain the alleged inferiority of French civil law.

It is clear that the legal origins literature is based on a particular, biased selection of “cherry-picked” legal doctrines. A different selection of “cherry-picked” legal doctrines would produce a different assessment. We discuss examples that look at substantive law and procedure in the core areas of property, contracts, and torts. These are areas that have been documented as being crucial for economic growth. The second set of examples looks at the organization of the legal system and governance. The influence of these variables on economic growth is more controversial, but they are part of the argument against the efficiency of French civil law. We argue that a careful examination of rules and legal institutions shows that the inefficiency hypothesis of French law is not sustainable under the current framework of comparative law and economics.

Our goal is not to argue that French law is more efficient than common law. Rather, our criticism is essentially methodological. Robust micro-based assessments of rules and legal institutions should prevail over macro generalizations and “cherry-picking” theories that lack a serious theoretical framework. The academic discussion concerning the efficiency superiority of the common law should not overcome the detailed study of legal institutions around the world. Successful legal reforms need to address local problems under local restrictions and specific determinants. In our view, legal reforms based on misperceptions and generalizations are actually detrimental.

## I. INTRODUCTION

Recent work by legal economists has emphasized the superiority of the common law system over French civil law (while absolving German and Scandinavian civil law from a similar fate).<sup>1</sup> This perspective has become popular in legal scholarship as well as in legal policy making (in particular, under the auspices of some programs associated with the World Bank).<sup>2</sup> This article proposes a methodological critique of such work. In our view, robust micro-based assessments of rules and legal institutions should prevail over macro generalizations and the “cherry-picking” of legal doctrines that lack a serious theoretical framework. This article puts

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<sup>1</sup> See, e.g., Rafael La Porta, Florencio Lopez de Silanes, Andrei Schleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

<sup>2</sup> See, e.g., Vivian Grosswald Curran, *Comparative Law and Legal Origins Thesis: “[N]on scholae sed discimus vitae discimus”*, 57 AM. J. COMP. L. 863 (2009).

forth alternative “cherry-picked” theories in order to show the limitations of this type of work. We also suggest that understanding different court structures under an assumption of one-size-fits-all is incorrect.

Our article does not suggest that French law is more conducive to efficiency than common law. Rather, our criticism is essentially methodological. The relative efficiency merits of the common law and of French civil law cannot deter a deeper analysis of legal institutions worldwide. Mere generalities without a careful examination of rules and legal institutions invalidate the inefficiency hypothesis of French law. A sophisticated theory has to be developed. We are skeptical that such a theory can ever be sustained. Our argument is that the current prevalent methodology embraced by many legal economists is incapable of producing such a theory.

Our article makes three important contributions. We start by showing that the legal origins literature cannot be easily based on the efficiency hypothesis of the common law, which has its own problems. But even if the efficiency hypothesis is true, it is insufficient to provide a theoretical framework to support the alleged superiority of the common law over French civil law. By debunking the relationship between the efficiency hypothesis and the legal origins literature, we are left with no consistent theory to support the latter. At that stage, it is clear that the legal origins literature is based on a particular, biased selection of “cherry-picked” legal doctrines.

Our second contribution shows that a diverse selection of “cherry-picked” legal doctrines produces a completely different assessment. The selection of particular legal doctrines is important when we analyze the “policy version” of the legal origins literature (the *Doing Business* reports). There are no theoretical reasons to select particular bundles of legal doctrines in order to measure the efficiency of a particular legal system since, in order to do that, we first need a theory. Our article states that no such theory exists; therefore, we are left with no explanation as for why one particular set of doctrines is better than another. Even excluding tort law, there are enough variations in property and contract law, substantively and procedurally, to foster a serious debate.<sup>3</sup>

We do not propose that our “cherry-picked” legal doctrines are better than those favored by the legal origins literature. Our point is simple: a different set of legal doctrines produces a different conclusion. Since there are no good theoretical or empirical grounds to support one set or another, this methodology does not advance the discussion. It is also the wrong methodology with which to select policy variables, as legal reforms based on it are likely to ignore relevant dimensions such as legal education, judicial human capital or legal culture.

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<sup>3</sup> See, e.g., Yoram Barzel, *Dispute and Its Resolution: Delineating the Economic Role of the Common Law*, 2 AM. L. & ECON. REV. 238 (2000) (arguing the efficiency of common law in contracts and property, but not in torts).

We look at examples in substantive law and procedure in the core areas of property, contracts and torts. These are areas documented as being crucial for economic growth (albeit the controversy over torts). We do not look at other fields of law because they have not been at the heart of the debate. For each core area considered, we “cherry-pick” a doctrine that seems more efficient, more market-oriented, or more conducive to economic growth under French law rather than under common law.

Our article is not a treaty in private comparative law. We do not discuss the complex details of each legal doctrine. Our four examples have been previously noted in the English-speaking law and economics literature, in some cases extensively.<sup>4</sup> Our goal is to present and discuss these examples in light of the legal origins literature. Our level of detailing is the same level that legal scholars have used to praise the Anglo-American option for contractual damages and to criticize the French preference for specific performance in the context of contractual breach.<sup>5</sup>

We consider the organization and governance of the legal system. Their correlation with economic growth is debatable but recognized in the literature. They have been part of the argument against the efficiency of French civil law.<sup>6</sup> We argue that under an economic model of specialization and capture, the French archetype is more appropriate under certain conditions. In particular, we discuss the existence of separate administrative law jurisdictions in French law. Legal economists have criticized this institutional arrangement as not providing an effective control over discretion by executive power and therefore facilitating state expropriation. Given the French preference for big government and significant state intervention in the economy, our argument is that the current institutional arrangements in France concerning administrative law could be more appropriate for the French case. Similarly, the current institutional arrangements in common law jurisdictions could be more appropriate for the Anglo-American countries. In this article, we are agnostic concerning the relationship between significant state intervention in the economy and economic growth. Our point is that if two legal systems have different institutional arrangements in administrative law, it does not necessarily imply that one must be more conducive of economic growth than the other. Depending on local determinants, either institutional arrangement may be appropriate.

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<sup>4</sup> See, e.g., Gani Aldashev, *Legal Institutions, Political Economy, and Development*, 25 OXFORD REV. ECON. POL'Y 257 (2009); Rafael La Porta, Florencio Lopez de Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008); Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

<sup>5</sup> See, e.g., Henrik Lando & Caspar Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 INT'L REV. L. & ECON. 473 (2004).

<sup>6</sup> See Mahoney, *supra* note 4.

Successful legal reforms need to address local problems under local restrictions and specific determinants. Legal reforms based on misperceptions and generalizations are harmful.<sup>7</sup> In this light, our article is an alert. We argue that there is currently no robust economic model to generate the prediction that French law is less conducive to economic growth than common law. If indeed French law is less friendly to economic growth than common law, then legal economists have to propose a sophisticated theory to substantiate that contention, not a theory based on a “cherry-picking” of legal doctrines and short-sighted comparisons.

Our article is not the first to criticize the methodology employed by the legal origins literature.<sup>8</sup> However, it appears that the current criticism is different from ours. Many authors have focused on the particular econometrics, which is very important to the legal origins literature given the empirical bias of the whole project.<sup>9</sup> Our article complements the econometric critique by arguing that the whole project has no theory. Without a theory, it is doubtful that the empirical results can support consistent growth policies.

Other authors have attacked the legal origins literature as a bad exercise in comparative law due to its shortage of details.<sup>10</sup> The problem with this line of inquiry is that it inevitably concludes that legal systems are not

<sup>7</sup> Benito Arruñada, *Pitfalls to Avoid When Measuring the Institutional Environment: Is Doing Business Damaging Business?*, 35 J. COMP. ECON. 729 (2007).

<sup>8</sup> See, e.g., *infra* notes 9-10.

<sup>9</sup> See generally Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?*, 41 LAW & SOC'Y REV. 865 (2007); John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579 (2009); John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems & Ajit Singh, *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMPIRICAL LEGAL STUD. 343 (2009); John Armour, Simon Deakin, Viviana Mollica & Mathias M. Siems, *Law and Financial Development: What We are Learning from Time-Series Evidence*, 2009 B.Y.U. L. REV. 1435 (2009); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813 (2009); Holger Spamann, *The 'Antidirector Rights Index' Revisited*, 23 REV. FIN. STUD. 467 (2010); Holger Spamann, *Legal Origin, Civil Procedure, and the Quality of Contract Enforcement*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 146 (2010); Mathias Siems & Simon Deakin, *Comparative Law and Finance: Past, Present, and Future Research*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 120 (2010); Daniel Klerman, Paul Mahoney, Holger Spamann & Mark Weinstein, *Legal Origin and Colonial History*, 3 J. LEGAL ANALYSIS (forthcoming 2011).

<sup>10</sup> See, e.g., Antonina Bakardjieva Engelbrekt, *Toward an Institutional Approach to Comparative Economic Law?*, in NEW DIRECTIONS IN COMPARATIVE LAW (Antonina Bakardjieva Engelbrekt & Joakim Nergelius eds., 2010) (pointing out the following problems: fallacies in classifying or measuring legal families, legal dynamics and transplants (difficulty of attributing law to legal families), and ideal types).

comparable and that efficiency and economic growth are not useful to understanding legal systems.<sup>11</sup> We disagree with such criticism. Our article avoids the details of a traditional comparative law approach precisely because such an approach does not help with understanding the limitations of the legal origin literature and self-defeats any meaningful and tractable efficiency analysis.

Finally, there is growing literature produced by French scholars rejecting efficiency as a measure of performance. The literature is very critical of law and economics and any kind of economics-oriented argument.<sup>12</sup> The novelty of our article is to make arguments favorable to French civil law without abandoning the efficiency framework.

The article goes as follows. Section II discusses the origins of the efficiency hypothesis of the common law and the current work in comparative law by legal economists. Section III discusses four legal problems that seem to be addressed more appropriately by French law than by common law—these four examples are our counter “cherry-picked” theories. Section IV discusses court specialization in administrative, commercial, and constitutional law from the perspective of capture (the standard argument against the French arrangements) versus specialization. Section V concludes this article.

## II. EFFICIENCY AND COMPARATIVE LAW

### A. *The Efficiency of the Common Law Hypothesis*

The efficiency of the common law generated discussion among legal economists quite early in the law and economics literature. Judge Posner introduced the controversial thesis in the first edition of his seminal book.<sup>13</sup> His main argument is that there is an implicit economic logic to the common law. In his view, the doctrines in common law provide a coherent and consistent system of incentives which induce efficient

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<sup>11</sup> Cf. H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. COMP. L. 133 (2001); Mathias M. Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 CARDOZO J. INT’L & COMP. L. 521 (2005); Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009); Mathias M. Siems, *Legal Originality*, 28 OXFORD J. LEGAL STUD. 147 (2008).

<sup>12</sup> For an English overview, see Claude Ménard & Bertrand du Marais, *Can We Rank Legal Systems According to Their Economic Efficiency?*, 26 WASH. U. J.L. & POL’Y 55 (2008). Other critiques in the same vein include Ruth V. Aguilera & Cynthia A. Williams, *“Law and Finance”: Inaccurate, Incomplete, and Important*, 2009 B.Y.U. L. REV. 1413 (2009) (proposing economic sociology as a better methodology) and Pierre Legrand, *Econocentrism*, 59 U. TORONTO L.J. 215 (2009) (criticizing the excessive economic focus of the legal origins literature). For a response to these critiques, see Gillian Hadfield, *The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law*, 59 U. TORONTO L.J. 223 (2009).

<sup>13</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2010).

behavior, not merely in explicit markets, but in all social contexts (the so-called implicit markets). For example, common law reduces transaction costs to favor market transactions when that is appropriate. Quite naturally, Judge Posner recognizes that not all doctrines in common law are economically justifiable or even easy to understand from an economic perspective. Economics does not offer a complete and exhausting theory of the common law, but his view is that it offers a balanced and significant explanation.

Judge Posner's hypothesis can be traced back to the evolutionary theory of the common law suggested by Justice Holmes in the 1880s.<sup>14</sup> Justice Holmes's main argument is that the development of the common law was driven by judicial responses to public policy rather than by some internal logic.<sup>15</sup> According to Holmes, the ability of the common law to adjust appropriately to external needs relied on the recruitment of the judiciary as representatives of the community.<sup>16</sup> Notably, the theory strongly opposed the then-prevalent codification movement in the United States.<sup>17</sup> Justice Holmes never used an efficiency argument for the common law (and against codification). Nevertheless, it is clear that Judge Posner's understanding of the common law is very close to the theory developed by Justice Holmes.

It is important to stress that the common law considered by Justice Holmes and Judge Posner traces back to the Blackstonian definition. According to Sir William Blackstone, the common law consists of general customs by which the judges and the courts are guided and directed.<sup>18</sup> Alternatively, the common law includes all legal doctrines that do not require a written form to be valid, but rather rely on the usage by courts.<sup>19</sup> Therefore, under the common law, statutes have a secondary and subordinate role. They are essentially declaratory (to restate the common law) or remedial (to correct the flaws of the common law).

However, in American legal history, the Blackstonian understanding of the common law has not been without controversy. For example, Justice Cardozo saw clear advantages in the codification process and recognized some advantages of the French legal method in shaping judgments.<sup>20</sup> The American codification debate in the nineteenth century clearly shows

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<sup>14</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* (Little, Brown & Co. 1945) (1881).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Sheldon M. Novick, *Introduction to the Dover Edition*, OLIVER WENDELL HOLMES, *THE COMMON LAW* (Gen. Publ'g Co., Ltd. 1991) (1881).

<sup>18</sup> 2 WILLIAM BLACKSTONE, *THE COMMENTARIES ON THE LAWS AND CONSTITUTION OF ENGLAND* (1796).

<sup>19</sup> *Id.*

<sup>20</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 29, 37 (Feather Trial Press 2009).



that there are multiple understandings of the role of the common law.<sup>21</sup> By proposing the efficiency hypothesis of the common law, Judge Posner seems to take one side of the discussion.<sup>22</sup> Unfortunately, most legal economists have not realized that the Posnerian hypothesis has to be understood in the context of a richer debate.<sup>23</sup> Looking at the debates in the past, the traditional arguments for the Blackstonian common law included flexibility, stability, and the ability to develop better rules without the need for statutes.<sup>24</sup> The conventional arguments against the Blackstonian understanding of the common law mentioned uncertainty (because of conflicting precedents), difficulty of non-lawyers to understand the law (due to higher transaction costs in modern economic language), and the error of allowing judges to legislate.<sup>25</sup>

In this context, consider the analytical models developed by legal economists.<sup>26</sup> The models discuss under which conditions respect for precedent generates evolution to efficiency (hence supporting the Posnerian hypothesis). The models never consider the limitations imposed by multiple and conflicting precedents. Inadvertently or not, legal economists have disregarded the different arguments for and against the Blackstonian common law. They have entered the discussion without paying enough attention to its numerous existing viewpoints that are both in favor of, and against, the common law.

In fact, Judge Posner's hypothesis of the efficiency of the common law begs for a more detailed explanation from the start. In particular, the hypothesis lacks a more explicit mechanism for explaining why the common law should be efficient. Due to the fact that Judge Posner's hypothesis cannot fully offer a complete model of evolution to efficiency, a remarkable literature emerged as a consequence.<sup>27</sup> Legal economists proposed different explanations that have been evolutionary models identifying the forces that have shaped the common law to generate efficient rules.<sup>28</sup>

One explanation is that judges have a preference for efficiency.<sup>29</sup> Another explanation is that efficiency is promoted by the prevalence of precedent (more efficient rules more likely to survive through a mecha-

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<sup>21</sup> See, e.g., Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355 (1999).

<sup>22</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 315 (8th ed. 2010).

<sup>23</sup> See, e.g., Morriss, *supra* note 21.

<sup>24</sup> *Id.* at 376-79.

<sup>25</sup> *Id.* at 369.

<sup>26</sup> See, e.g., *infra* notes 30-32.

<sup>27</sup> See *infra* notes 30-32.

<sup>28</sup> See Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUPREME CT. ECON. REV. 19 (2005).

<sup>29</sup> Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 SJ. LEGAL STUD. 103 (1979).

nism of precedent).<sup>30</sup> A third explanation relies on the incentives to bring cases and the role of court litigation (since inefficient rules are not welfare maximizing).<sup>31</sup> Nevertheless, the precise nature of the mechanism that justifies the efficiency hypothesis is problematic even taking these early explanations into account.<sup>32</sup>

The search for a more convincing setup for the efficiency of the common law hypothesis has sparked important academic work. This literature essentially looks at how litigation improves the law, or some specific legal doctrine, taking into consideration that only a self-selected number of cases are actually litigated.<sup>33</sup> In particular, the efficiency of the common law is unequivocally related to the observation that litigation follows

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<sup>30</sup> Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53-57 (1977).

<sup>31</sup> George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

<sup>32</sup> See Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007); Nicola Gennaioli & Andrei Shleifer, *Overruling and the Instability of Law*, 35 J. COMP. ECON. 309 (2007); Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 J. LEGAL STUD. 157 (2009). Posner's original hypothesis posits that judges seek efficiency, whereas the later works by Rubin and Priest propose an invisible hand. Gennaioli and Shleifer show that even if judges are efficiency-seeking, precedent and overruling must be balanced in an appropriate way. A judicial bias might distort the law in the short run, but also provides the mechanism to improve the law in the long run. Miceli introduces the possibility of selective litigation to show that convergence to efficiency is still possible as long as the biases do not overwhelm the likelihood that inefficient laws will be more often litigated. Strong precedent is socially valuable if judges are significantly biased.

<sup>33</sup> See generally FRANCESCO PARISI & VINCY FON, *THE ECONOMICS OF LAWMAKING* 85-88 (2009); PAUL H. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES* 14 (1983); MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 464-67 (West 2009); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006); Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); Vincy Fon, Francesco Parisi & Ben Depoorter, *Litigation, Judicial Path-Dependence, and Legal Change*, 20 EUR. J. LAW & ECON. 43 (2005); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981); Georg von Wangenheim, *The Evolution of Judge-Made Law*, 13 INT'L REV. L. & ECON. 381 (1993). A critical view of this literature is provided by FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 103-08 (2009).

private interests.<sup>34</sup> Presumably, bad rules are challenged more often than good rules; thus, court intervention will naturally improve the overall quality of the law.<sup>35</sup> However, this line of reasoning has problematic shortcomings. It is possible that the subset of cases actually litigated is inadequate to trigger the necessary improvements, hence biasing the evolution of legal rules against efficiency.<sup>36</sup> Furthermore, the emergence of efficiency in common law depends on a number of factors in the evolutionary mechanism, namely initial conditions, path dependence, and random shocks.<sup>37</sup> Finally, if the common law is evolutionarily efficient, we are left with no explanation for the important doctrinal differences across common law jurisdictions (in particular, taking into account that presumably they have the same *de jure* initial condition, namely English law).<sup>38</sup>

The literature on the efficiency of the common law that followed Posner's hypothesis is not comparative in nature, but effectively looks at judge-made law. Therefore, the alleged efficiency should hold in any jurisdiction with respect to either judge-made law or general principles of law developed by courts (as it is better known in civil law jurisdictions). In fact, from the perspective of civil law countries, the argument could be rephrased as court interventions improving the overall efficiency of the legal system because of the common biases of litigation (i.e., more inefficient laws will be subject to more court intervention than less efficient laws). It is well known that tort law is an area of French law that has been systematically developed by case law given the absence of specific codification in the 1804 civil code (all French tort law is based on article 1382 of the civil code).<sup>39</sup> As a consequence, we should treat torts from the perspective of the efficiency of the common law similarly in both the United States and France. The only relevant question, then, is the extent to which the litigation biases in the area of torts increase or decrease efficiency of the law.<sup>40</sup>

Let us suppose that there are more occasions for court intervention and judgment in a common law legal system than under code law. It could therefore be argued that the appropriate mutation towards efficiency will be faster in common law than in civil law. However, such a conclusion

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<sup>34</sup> William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (noting that judicial opinions are a public good that arbitration fails to provide).

<sup>35</sup> Rubin, *supra* note 30; Priest, *supra* note 31.

<sup>36</sup> Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 584-85 (1992).

<sup>37</sup> Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 642-43 (1996).

<sup>38</sup> That is, unless we consider adaptation to distinct local circumstances across the Anglo-American world, but such explanation is exogenous to the original model.

<sup>39</sup> EVA STEINER, *FRENCH LEGAL METHOD* 90 (2002).

<sup>40</sup> See Barzel, *supra* note 3.

relies on the inability of statute creation and modification to supplement any “delays” in the evolutionary process.

At the end of the day, the Posnerian hypothesis does not place common law in a better position than civil law in the evolution towards efficient rules. It does not provide a convincing framework to argue that judicial precedent is a superior way to promote an efficient solution than a statutory rule precisely because the focus is on judge-made law.<sup>41</sup> Under the common law reasoning, bad decisions are overruled in the same way that under civil law bad statutes can be effectively corrected by the judiciary.<sup>42</sup> There is no theoretical or empirical basis to assert that courts and juries are in a better position in common law, rather than in civil law, jurisdictions to calculate the consequences of their decisions more appropriately than the government.<sup>43</sup> That judge-made law can be better understood as a set of rules designed to maximize economic efficiency, as Judge Posner proposed, is not an exclusive feature of common law jurisdictions.<sup>44</sup> Furthermore, Judge Posner finds important functional differences between the United States and Britain, and recognizes important similarities between the current institutional arrangements in Britain and in continental Europe.<sup>45</sup>

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<sup>41</sup> For a technical model, see Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 *J. LEGAL STUD.* 379 (2008) (predicting the progressive convergence of common and civil law toward a mixed system). See also Giuseppe Dari-Mattiacci, Bruno Deffains & Bruno Lovat, *The Dynamics of the Legal System*, *J. ECON. BEHAV. & ORG.* (forthcoming 2011) (explaining the relationship between high litigation rates and the balance between case law and legislation); Carmine Guerriero, *Democracy, Judicial Attitudes, and Heterogeneity: The Civil Versus Common Law Tradition*, (Univ. of Cambridge, Working Paper No. 0917, 2009) (arguing that case law outperforms statute law when political institutions are weak).

<sup>42</sup> See, e.g., Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 *INT'L REV. L. & ECON.* 519 (2006) (discussing jurisprudence constant).

<sup>43</sup> Although we recognize, for example, the role of Brandeis brief in American litigation. The Brandeis brief is certainly a mechanism to improve knowledge concerning factual consequences. As to the more general discussion about the relative merits of courts and juries versus the legislative and executive branches, see RAOUL C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* 127-68 (1987). In his view, legislation has the advantage of being binding and authoritative, even if less flexible. On the other hand, he accepts that case law is more certain if *stare decisis* prevails, which is hardly the case in most common law jurisdictions nowadays, since precisely good legal arguments can undermine precedent and hence provide more flexibility. However, according to Professor Caenegem, common law lacks generalization and a conceptual framework.

<sup>44</sup> See POSNER, *supra* note 13, at 315.

<sup>45</sup> See RICHARD POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 69-114 (1996); see also Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 *AM. J. COMP. L.* 347 (1994).

If the Posnerian hypothesis is true, at least in the long run, rules that do not promote efficient results should be repealed regardless of the legal system. Therefore, the central question is not whether one legal family or another promotes an economic efficiency solution, but which of these two main legal families reaches the adequate result (always from the economic perspective) at a lower cost in terms of delays and opportunity costs.<sup>46</sup> From a solely cost perspective, it is not clear that the type of cost attached to general axiomatic legal solutions, characteristic of civil law approaches, is necessarily higher than litigation costs incurred in the approach developed by common law.<sup>47</sup>

### B. *Judge-Made Law v. Statute Law*

Our argument is that the next step of arguing that judge-made law is more efficient than statute law requires further reasoning. The mere Posnerian efficiency hypothesis of the common law cannot support the conclusion that lawmaking by legislation is necessarily less efficient than court intervention. One of the main arguments for the superiority of judge-made law is that private interests are more likely to capture the legislature than the courts, although such argument is debatable at the theoretical, as well as empirical, level.<sup>48</sup> In fact, there is no systematic evidence that rent-seeking is more persistent with the legislature than

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<sup>46</sup> See the critique of Posner's argument in DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 15-17 (2000).

<sup>47</sup> A different perspective is defended by JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968). In his view, common law is a byproduct of litigation confirmed by creative adjudication. Initially, a small group of judges with a decentralized court system administered and controlled the remedies of common law. However, because the common law was captured and monopolized by a dominant group, it became narrower, insular and unable to respond to the emerging needs of the late 18th and 19th centuries. On the contrary, in France, there was a reaction to an over-powerful judiciary under customary law. The *Parlement* of Paris emerged as a central court after 1250. Customs were developed by a combination of central and local courts. The *Parlement* was the highest judicial body and lawmaker. The codification was a reaction to excessive judicial interference. The basic idea of codification was not to eliminate case law, but to introduce the need for explaining and defending decisions when supplying new rules. Hence, the birth of reasoned opinion was a response to perceived excessive judicial interference in lawmaking.

<sup>48</sup> The most devastating criticisms are GORDON TULLOCK, *THE CASE AGAINST THE COMMON LAW* (1997) and GORDON TULLOCK, *Rent-Seeking and the Law*, in *SELECTED LEGAL WORKS* 186 (Charles. K. Rowley ed., 2005). See also Michael A. Crew & Charlotte Twight, *On the Efficiency of Law: A Public Choice Perspective*, 66 *PUB. CHOICE* 15 (1990) (arguing that common law is less subject to rent-seeking than statute law); Paul H. Rubin, *Common Law and Statute Law*, 11 *J. LEGAL STUD.* 205, 211-16 (1982) (arguing that both are influenced by private interests to advance their goals); Barbara Luppi and Francesco Parisi, *Litigation and Legal Evolution: Does Procedure Matter?*, *PUB. CHOICE* (forthcoming 2011).

with the courts, since demand and supply conditions are fundamentally different.<sup>49</sup> Moreover, courts and legislators have their own goals in terms of enhancing their influence which complicates the potential effect of private interests in lawmaking.<sup>50</sup>

The more adversarial nature of litigation in common law rather than in civil law could generate more rent-seeking and more rent dissipation in the process of rulemaking.<sup>51</sup> Furthermore, given the growing predominance of statute law in common law jurisdictions, the inevitable conclusion is that the overall efficiency has been reduced.<sup>52</sup> This conclusion is reinforced by the argument that the efficiency of the common law is not really demand-side-induced (i.e., through the incentives provided by litigation) but rather supply-side-induced. The historical competition between common law and equity courts was the driving force; once these courts were merged and monopoly had been achieved, the efficiency forces lost stimulus.<sup>53</sup> Nevertheless, a similar historical competition

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<sup>49</sup> See generally W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979); W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959 (1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (discussing several theories of capture in rulemaking).

<sup>50</sup> See generally 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, 496-97 (1999). For an interesting comparison of lawmakers' influences under English and French systems, see J. W. F. ALLISON, *A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW* 114-27 (1996).

<sup>51</sup> Todd J. Zywicki, *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, 135 PUB. CHOICE 35, 44-46 (2008).

<sup>52</sup> See Rubin, *supra* note 48 (noting that the common law might have been more efficient in the past when the organization of interests was more costly, but not now). Also, these arguments face a serious challenge in areas such as antitrust law, which are statute law precisely because the traditional principle of fair trade in common law did not protect market competition and courts were excessively deferential to monopolies.

<sup>53</sup> Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003) (arguing for supply-side explanations based on the competition between several court systems, particularly common law and equity). A more comprehensive discussion is provided by Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (arguing that institutional structures that were able to produce more innovative legal rules tended to prevail in English law). However, he challenges the efficiency of the supply-side competition between these courts. He notes that there

between royal, guild, and ecclesiastical courts existed in civil law jurisdictions.<sup>54</sup>

Notice that the relative efficiency of judge-made versus statute law, by itself, does not provide a good framework to justify the superiority of the common law system as compared to the civil law system. First, statute law is important in common law jurisdictions; many important areas of private law, such as torts or even commercial law, are essentially common law even in civil law jurisdictions. Second, the biases of legislation and litigation are not qualitatively and quantitatively similar in both legal systems due to procedural and substantive differences. Once again, the efficiency hypothesis of the common law coupled with the alleged bias of legislation for private capture are insufficient to support the argument that French civil law is necessarily inferior to the common law.

In fact, the traditional Posnerian analysis could be transposed to French civil law in multiple forms. The general law (or code) is arguably more efficient than specific statutory interventions that are potentially prone to more capture. It could also be said that bottom-up law (for example, case law piling up under general code provisions such as tort law under article 1382 of the French civil code) is more appropriate than top-down law (including very detailed code provisions as well as specific statutes). Nothing in the discussion makes the argument unique to common law systems. It also does not provide a rigorous framework from which to derive any implications for comparative law.

### C. *Comparative Legal Systems*

The third wave in the debate has been essentially empirical.<sup>55</sup> This new literature defends the premise that legal systems with origins in the

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was a pro-plaintiff bias that generated certain (hardly efficient) rules given the way judges were paid. Important changes to judicial compensation and salaries corrected the pro-plaintiff bias in the 19<sup>th</sup> Century.

<sup>54</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL CULTURE* (1983); HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2006). More recently, unlike the common law jurisdictions, the civil law jurisdictions have seen serious competition between supreme courts and constitutional courts to maximize their jurisdiction. See Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Party and Judicial Politics* (2010) (unpublished manuscript), available at [https://editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=ALEA2010&paper\\_id=208](https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=208).

<sup>55</sup> See, e.g., Gani Aldashev, *Legal Institutions, Political Economy, and Development*, 25 OXFORD REV. ECON. POL'Y 257 (2009); Rafael La Porta, Florencio Lopez de Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008); Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001). The most critical claim is against French law, since other civil law systems (German and Scandinavian) perform at least as well as common law. Rafael La Porta, Florencio

English common law have superior institutions for economic growth and development than those of French civil law for two reasons.<sup>56</sup> First, common law provides more adequate institutions for financial markets and business transactions, which in turn fuels more economic growth.<sup>57</sup> Second, French civil law presupposition of a greater role for state intervention is detrimental for economic freedom and market efficiency.<sup>58</sup>

The relationship between growth or economic performance and the type of legal system carries an implicit assumption: law and legal institutions matter for economic growth.<sup>59</sup> This assumption, as critical and debatable as it can be, is unrelated to the two previous questions concerning the efficiency hypothesis of the common law and the inferiority of legislation. Nevertheless, these questions loosely inspired the two mentioned explanations for the alleged empirical evidence.

Given the dominance of statute over case law, the interest group or rent-seeking theories should go against French law. However, we have already identified several caveats with this line of reasoning. The pro-market bias of the common law (the idea of some Hayekian bottom-up efficiencies in the English legal system and top-down inefficiencies in the French legal system) might be an important argument, but the existence of some anti-market bias in French law is debatable.<sup>60</sup> It could be that

Lopez de Silanes, Andrei Schleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998). For a more recent article finding the opposite result when focusing on the quality of the court system, see Frank B. Cross & Dain C. Donelson, *Creating Quality Courts*, 7 J. EMPIRICAL LEGAL STUD. 490 (2010) (concluding common law is negatively correlated to the quality of courts in Europe).

<sup>56</sup> See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006); see also Mark J. Roe & Jordan I. Siegel, *Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus*, 47 J. ECON. LITERATURE 781 (2009). With respect to the taxonomy problem posed by common versus civil law, see Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

<sup>57</sup> See La Porta et al., *The Economic Consequences of Legal Origins*, *supra* note 55.

<sup>58</sup> See Mahoney, *supra* note 55.

<sup>59</sup> Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002).

<sup>60</sup> We do not discuss here that, in some particular areas of the law or concerning some specific statutes, French law might have some anti-market bias whereas common law takes a pro-market position. The opposite is also true, as we show with our examples in the second part of the article. Here, we refer to a general bias in the legal system. See Benito Arruñada & Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 WASH. U. J.L. & POL'Y 81 (2008); Benito Arruñada & Veneta Andonova, *Judges' Cognition and Market Order*, 4 REV. L. & ECON. 665 (2008). The alleged business bias of the 1804 French civil code as understood by contemporary legal scholars is discussed by JEAN-LOUIS HALPERIN, *THE FRENCH CIVIL CODE* 59-60 (Basil Markesinis & Jörg Fedtke, eds., Tony Weir trans., 2d ed. UCL Press 2006) (2003). A more general discussion can be found at John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996).



traditional French legal scholarship has been less concerned with efficiency arguments. However, the lack of interest exhibited by French legal scholars concerning pro-market legal policies does not constitute strong evidence that French law itself is contrary to efficiency.<sup>61</sup> The lack of inclination for efficiency exhibited by French legal scholars has little bearing for the efficiency of French law.<sup>62</sup>

Even the thesis that French law is less effective than the common law in protecting property rights from state predation has been disputed.<sup>63</sup> In fact, current models developed to explain these differences have been subject to serious criticism.<sup>64</sup> Stability of the law is another argument in favor of judge-made law with deference to precedent against systematic and chaotic legislative production.<sup>65</sup> In this respect, however, the existence and importance of dissenting opinions cannot be seen as a contribution to the stability of the law. Furthermore, it is not empirically clear that case law is more stable and less ambiguous than legislation.<sup>66</sup>

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<sup>61</sup> See Catherine Valcke, *The French Response to the World Bank's Doing Business Reports*, 60 U. TORONTO L.J. 197-217 (2010); see also Bénédicte Fauvarque-Cosson & Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law*, 57 AM. J. COMP. L. 811 (2009). There is also an interesting discussion concerning the shortcomings of law and economics in France in MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* (2009).

<sup>62</sup> See Valcke, *supra* note 58; Fauvarque-Cosson & Kerhuel, *supra* note 61.

<sup>63</sup> Compare Simeon Djankov, Edward Glaeser, Rafael La Porta, Florencio López-de-Silanes & Andrei Shleifer, *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003), with Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401 (2003).

<sup>64</sup> For the economic models, see Ron Harris, *Law, Finance and the First Corporations*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW* (James J. Heckman, Robert L. Nelson, & Lee Cabatingan eds., 2009); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401, 408 (2003) and Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193 (2002). For discussion, see Mark J. Roe, *Legal Origins, Politics, and Modern Stockmarkets*, 120 HARV. L. REV. 460 (2006); Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21 (2007); Daniel Klerman & Paul G. Mahoney, *Legal Origin?*, 35 J. COMP. ECON. 278 (2007); Mark J. Roe, *Juries and the Political Economy of Legal Origin*, 35 J. COMP. ECON. 294 (2007); Howard Rosenthal & Eric Voeten, *Measuring Legal Systems*, 35 J. COMP. ECON. 711 (2007); Gillian K. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, 36 J. COMP. ECON. 43 (2008); Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Comparative Law*, 57 AM. J. COMP. L. 765 (2009); Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy*, 57 AM. J. COMP. L. 831 (2009); John Reitz, *Legal Origins, Comparative Law, and Political Economy*, 57 AM. J. COMP. L. 847 (2009).

<sup>65</sup> Cross, *supra* note 64.

<sup>66</sup> For mixed evidence, see Cross, *supra* note 64, at 41-46.

Another possibility is the enhanced willingness in common law jurisdictions to allow choice of law. But globalization of business transactions has exerted enormous pressure for change in civil law jurisdictions in this respect.<sup>67</sup> Overall, it might be that the common law is more efficient and positively correlated with economic growth, but that the causation is definitely under-theorized to a larger extent.<sup>68</sup>

The mechanism for the efficiency of the common law versus French civil law is intrinsically convoluted and debatable.<sup>69</sup> Furthermore, the competition between common law and civil law in hybrid systems does not provide an empirical answer as to which legal system prevails in the long-run, because we would expect the most efficient legal system to be chosen by the relevant legal actors in a hybrid system.<sup>70</sup> Finally, if indeed

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<sup>67</sup> See Erin O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); ERIN O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009) (proposing jurisdictional competition to improve efficiency). Traditionally, there has been more freedom of choice of law in common law systems (for example, in the area of corporate law).

<sup>68</sup> See Cross, *supra* note 64; DAM, *supra* note 56; Klerman et. al., *supra* note 9 (showing that legal origins does not seem to explain growth once legal and colonial origins are included in the regression analysis). Moreover, alternative theories might explain why certain institutions, related or unrelated to legal origin, cause economic growth. See, e.g., Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949 (2005); Daron Acemoglu & Simon Johnson, *Disease and Development: The Effect of Life Expectancy on Economic Growth*, 115 J. POL. ECON. 925 (2007); Robin M. Grier, *Colonial Legacies and Economic Growth*, 98 PUB. CHOICE 317 (1999); Daron Acemoglu, Simon Johnson, & James A. Robinson, *Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Daron Acemoglu, Davide Cantoni, Simon Johnson & James A. Robinson, *The Consequences of Radical Reform: The French Revolution* (Nat'l Bureau of Econ. Research, Working Paper No. 14831, 2009).

<sup>69</sup> See, e.g., Anthony Ogus, *Economic Approach: Competition Between Legal Systems*, in *COMPARATIVE LAW: A HANDBOOK* 155 (Esin Örüçü & David Nelken, eds., 2007). According to Professor Ogus, common law might be particularly appropriate for economic growth due to more freedom of choice of applicable legal regime, better facilitative law due to competition, and a decentralized and less bureaucratized administration of justice. In particular, the administration of justice in common law includes non-career judges, greater use of juries and non-professional judges, greater reliance on precedent and customary law, less reliance on legislation and codification, and oral rather than written procedures. All these characteristics produce two important advantages. First, mutual trust in commercial relations and enforcement of property rights is more effective. Second, common law is closer to preferences of citizens because it is bottom-up. *But see* David Nelken, *Comparative Law and Comparative Legal Studies*, in *COMPARATIVE LAW: A HANDBOOK* 3 (Esin Örüçü & David Nelken eds., 2007) (defending the proposition that more bureaucratized provisions of legal remedies could be more effective).

<sup>70</sup> Ogus, *supra* note 69 (arguing that hybrid legal systems may benefit from competition of different legal cultures and, in that respect, that legal diversity is good); *see also* H. Patrick Glenn, *Comparing*, in *COMPARATIVE LAW: A HANDBOOK*

the common law was more efficient and more conducive to economic growth, the question of how to move from one to the other remains largely unaddressed. Legal culture, rent-seeking, and accumulated human capital raise the costs of such transplantation.<sup>71</sup>

The analysis is complicated by the fact that the economic superiority of the common law is now the model for legal reform, as embodied by the *Doing Business* reports promoted by the World Bank.<sup>72</sup> There are good reasons to be careful about the implications of the *Doing Business* reports in the economy since they could be detrimental.<sup>73</sup> Furthermore, the basic rationale begs for a more theorized framework. The idea that ex ante regulation or administrative intervention always produces inefficient out-

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91 (Esin Örüçü & David Nelken eds., 2007) (providing a good example in Quebec law, which has survived because the common law could not displace the written, substantive law of French origin already in place); Esin Örüçü, *A General View of Legal Families and of Mixed Systems*, in *COMPARATIVE LAW: A HANDBOOK* 169 (Esin Örüçü & David Nelken eds., 2007) (providing a number of examples; one example is Malta, where French commercial law has survived the British influence even when exercised through constitutional law). Other examples include the colonial imposition of common law upon a civil law tradition that did not destroy it, as in Louisiana or South Africa. The evolution of the Scottish system provides a different angle, since the influence of common law is due to the proximity and need to promote commercial interaction and close cultural and political ties with England. Still, the civil law has prevailed.

<sup>71</sup> See, e.g., Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339 (2006).

<sup>72</sup> *Doing Business*, THE WORLD BANK, <http://www.doingbusiness.org> (last visited Jan. 26, 2011).

<sup>73</sup> Benito Arruñada, *Pitfalls to Avoid When Measuring the Institutional Environment: Is Doing Business Damaging Business?*, 35 J. COMP. ECON. 729 (2007); Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 LAW & SOC. INQUIRY 1095 (2007). A more comprehensive criticism is provided by Bertrand du Marais, *Les Limites Méthodologiques des Rapports Doing Business*, Programme de Recherches Attractivité Economique du Droit, Working Paper No. AED-2006-01, 2006); Didier Blanchet, *Analyses Exploratoires des Indices Proposés par les Rapports Doing Business 2005 et 2006 de la Banque Mondiale* (Programme de Recherches Attractivité Economique du Droit, Working Paper No. AED-2006-03, 2006); DES INDICATEURS POUR MESURER LE DROIT? LES LIMITES MÉTHODOLOGIQUES DES RAPPORTS Doing Business (Bertrand du Marais ed., 2006). The U.S. Congress has now formally criticized the *Doing Business* project, and echoed some of the questions raised by legal economists, particularly with respect to employment law (House of Representatives, 111th Congress, Report 1st Session, Reform of the *Doing Business* Report of the World Bank, June 24, 2009, at 44-45). An internal evaluation of the World Bank has also identified further problems. See INDEPENDENT EVALUATION GROUP, *DOING BUSINESS: AN INDEPENDENT EVALUATION, TAKING THE MEASURE OF THE WORLD BANK-IFC DOING BUSINESS INDICATORS* (2008), [http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/89BD8FE6BF3C8D93852574EF0050E7DE/\\$file/db\\_evaluation.pdf](http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/89BD8FE6BF3C8D93852574EF0050E7DE/$file/db_evaluation.pdf) (last visited Jan. 26, 2011).

comes whereas ex post litigation always produces efficient outcomes is inconsistent with the recognized trade-off between these two alternatives.<sup>74</sup> The choice between ex ante control and ex post liability depends on several possible variables of the economic model, including determination of damages, timing, asymmetric information and enforcement costs.<sup>75</sup> It is here that we identify an efficiency syndrome of the literature on the common law: the suggestion that the common law choice of institutional response is optimal, and therefore the French choice of institutional design is necessarily detrimental. This suggestion cannot hold, because it is unclear from the economic models that one or the other is the appropriate response.<sup>76</sup> Second, the suggestion implicitly assumes that the variables are the same in every jurisdiction and therefore there is only one right answer (a one-size-fits-all approach).<sup>77</sup> The prevailing preference for ex ante administrative intervention in French law, as opposed to the overall preference for ex post litigation in common law, might respond efficiently to different local problems and constraints.

A careful examination of rules and legal institutions shows that the inefficiency hypothesis of French law is not sustainable under the current framework of comparative law and economics, not least because many areas of French law, such as torts, commercial, and administrative review, are judge-made law.<sup>78</sup> Moreover, general cross-country comparisons are informative, but can also be badly formative processes if they are used to inadequately shape legal reform based on misguided and unsafe generalizations.<sup>79</sup>

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<sup>74</sup> Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271 (1984). See also Jacob Nussim & Avraham D. Tabbach, *Controlling Avoidance: Ex Ante Regulation Versus Ex Post Punishment*, 4 REV. L. & ECON. 45 (2008); Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193 (1977).

<sup>75</sup> See sources cited *supra* note 74.

<sup>76</sup> See Shavell, *supra* note 74.

<sup>77</sup> See *id.*

<sup>78</sup> According to EVA STEINER, FRENCH LEGAL METHOD 90-91 (2002), the landmarks of French case law are: (i) Administrative law: Blanco (1873) & Cadot (1889), developing state liability; and Administration des Douanes (1975), ruling the superiority of treaties over statutes; (ii) Contract law: Canal de Craponne (1876), limiting court interventionism in contract law; (iii) Commercial law: *Caisse Rurale Commune de Manigod v. Administration de l'Enregistrement* (1914), distinguishing between profit and non-profit commercial societies; and *Comité d'Etablissement de Saint-Chamond v Ray* (1954), granting legal personality to corporate bodies; (iv) Property law: *Clément-Bayard v Cocquerel* (1915), limiting *abus de droit* in property law; (v) Torts: *Veuve Jand'heur* (1930), establishing a principle of tort liability; (vi) Family law: *Proc. Gén. C. de Cass. v Madame X* (1991), regulating surrogate motherhood.

<sup>79</sup> Misunderstandings about the role of courts in French law are common. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND

#### D. From “Cherry-Picking” Theories to Systemic Generalizations

As we have emphasized before, our goal is not to argue that French law is more efficient than common law. Our criticism is essentially methodological. Robust micro-based assessments of rules and legal institutions should prevail over macro generalizations that lack a serious theoretical framework. The obsession with the efficiency of the common law should not overcome the detailed study of legal institutions around the world. Successful legal reforms need to address local problems under local restrictions. Legal reforms based on misperceptions and generalizations could be more detrimental than doing nothing.

Surely there are many examples of rules and institutions that are more efficient in the common law world than in the French traditions. They have been successfully identified by the literature we have reviewed.<sup>80</sup> There are also many doctrines in the common law that an efficiency perspective cannot easily explain. There is no doubt that, within each legal system, we can find efficient doctrines as well as inefficient legal rules—but at the end of the day, the goal must be to identify which legal system performs better overall.

Sophisticated indicators must be constructed in order to understand which legal system performs better overall. These indicators must balance the relevant aspects of substantive law, procedure, enforcement, and legal institutions, while also taking local determinants into account. Inev-

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POLITICS IN CONSTITUTIONAL LAW 102-04 (2009) (arguing that the apparent formalism of French judges decreases transparency and concluding that the whole process is a scam, since the *rappports* include policy arguments but are not made public to keep the fiction that courts are not making law). MICHEL DE S. O. L’E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 299-321 (2004) (arguing that, under the American academic imagination, the French style of judicial deliberation stands for non-transparency because it lacks individual accountability and possesses an absence of democratic deliberation; American legal scholarship mistakenly considers that French judges have no individual responsibility on shaping doctrines and developing law). The author attributes the misunderstanding to the classical work by Dawson, *supra* note 47.

<sup>80</sup> Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75, 83-90 (Thomas Carothers ed., 2006), identifies shortcomings with this argument in the context of American law, particularly: (i) rule by politicized judges, or at least permeated by politics, and not by apolitical judges (US judges allow their preferences to overrule law when the opportunity arises); (ii) inconsistency in legal rules and in results are allowed, if not promoted; (iii) the jury system makes results and outcomes less predictable; and (iv) access to justice undermines equality which undermines the universality of legal norms. *See also* Ogus, *supra* note 71 (discussing two important aspects: (i) civil law seems to protect consumers more than traders unlike the common law and (ii) France has a more generous compensation for traffic accidents which inevitably results in higher transport costs that may undermine competitiveness).

itably, we need a micro theory where aspects and determinants are relevant to support the viability of these indicators. Without such a sophisticated theory, the indicators will be based on a mere “cherry-picking” of examples and doctrines conveniently assembled to support a particular inclination concerning the relative efficiency of a particular legal system.

Traditional “cherry-picking” approaches have reinforced the view that the common law is more efficient. But that is only part of the story—and our article provides the other part. We describe some examples where French law is likely to be more adequate than common law from an efficiency perspective, or at least as efficient.

With no micro theory (and we doubt one can be easily developed), we are left with the alleged superiority of the common law based on mere cross-section regressions. Our examples are sheer illustrations of the methodological problems of such an approach. That is why we have opted for a brief discussion of several relevant examples, rather than a detailed analysis of a particular case.<sup>81</sup> Our examples are intended “cherry-picking,” much in the same way previous authors have defended the superiority of the common law. We believe this “cherry-picking” exposes the flaws of an incomplete economic analysis.

We discuss two fundamental illustrations that correspond to the two main lines of reasoning against French law.<sup>82</sup> We start with examples that look at substantive law and procedure in the core areas of property, contracts, and torts. Economists have argued these are the relevant areas to

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<sup>81</sup> See, e.g., UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 182-92 (1996) (discussing comparative efficiency of penalty clauses in contracts, private trusts, and the path of legal change across legal families). For a discussion of efficient doctrines in contract law, see Aristides N. Hatzis, *Civil Contract Law and Economic Reasoning: An Unlikely Pair?*, in *THE ARCHITECTURE OF EUROPEAN CODES AND CONTRACT LAW* 159 (Stefan Grundmann & Martin Schauer eds., 2006); Ejan Mackaay, *The Civil Law of Contract*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Gerrit de Geest ed., 2d ed. 2010). The existence of penalty clauses in French contract law, a point we skip in our discussion given the existence of literature on the matter, is of particular importance. For a discussion of efficient rules in property law, see Norman Barry, *Property Rights in Common and Civil Law*, in *THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS* 177 (Enrico Colombatto ed., 2004) (observing some convergence in both legal systems). *But see* Dan Bogart & Gary Richardson, *Making Property Productive: Reorganizing Rights to Real and Equitable Estates in Britain, 1660-1830*, 13 *EUR. REV. ECON. HIST.* 3 (2009) (suggesting that the improvements in property law in Britain have been achieved by statute and not judge-made law).

<sup>82</sup> DAM, *supra* note 56, mentions (i) contracts and property (inspired by new institutional economics), (ii) enforcement in the broad sense (procedural rules), (iii) public law (although here the distinction between common law and civil law is incorrect in our view), in particular judicial review and administrative separate jurisdiction (allegedly less independent), and (iv) legal culture and governance.

foster economic growth.<sup>83</sup> Our “cherry-picking” approach challenges the traditional focus on specific efficiencies of the common law doctrines by presenting alternative efficiencies of French law.

Our second set of examples looks at the organization of the legal system and governance.<sup>84</sup> In particular, they focus on decision-making processes and thus identify the conditions under which the common law courts are more prone to produce efficient case results than French courts.<sup>85</sup>

### III. EXAMPLES OF COMMON LAW V. FRENCH CIVIL LAW EFFICIENCIES

#### A. Bona Fide Purchase

Consider the following situation: a farmer buys cattle from a person who does not have a good title. The true owner wants the cattle back after this transaction has taken place. At this point, both the farmer, who has paid for the cattle in good faith, and the true owner seem to have strong claims of ownership.

In French law, like most civil law systems, good faith possession of movables produces a good title, even in situations where the *bona fide* purchaser acquires his right from someone without any right (in cases of *adquisitio a non domino*).<sup>86</sup> The traditional common law rule has been that no one can have a better title than the title one rightfully owns (*nemo plus iura in alium transferre potest quam ipse habet* or *nemo dat quod non habet*).<sup>87</sup> Therefore, mere current possession of property is not conclusive of title under English law, although it could be under French law and other civil law systems. Such a rule protects the interests of the current rightful owner against the fraud committed by third parties who sell a good lacking rightful authorization. The rule entitles the owner to recover the property from an innocent purchaser. As a consequence, the innocent purchaser cannot rely on the fact of having acquired the good from a seller under good faith.

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<sup>83</sup> See Mahoney, *supra* note 55.

<sup>84</sup> See *id.*

<sup>85</sup> See STEARNS & ZYWICKI, *supra* note 33 (concerning the case of the common law).

<sup>86</sup> This example was originally mentioned by Nuno Garoupa, *Doing Comparative Law and Economics: Why the Future is Micro and Not Macro*, in *ESSAYS IN THE LAW AND ECONOMICS OF REGULATION IN HONOUR OF ANTHONY OGUS* 63-70 (Michael Faure & Frank Stephen eds., 2008). For a general discussion on different legal treatments of *bona fide* purchase, see Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987); Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 Colum. L. Rev. (forthcoming 2011); OGUS, *infra* note 93; Ogus, *infra* note 93.

<sup>87</sup> See JOHN E. CRIBBET, CORWIN W. JOHNSON, ROGER W. FINDLEY & ERNEST E. SMITH, *PROPERTY: CASES AND MATERIALS* 122-32 (8th ed. 2002) (providing a classical explanation of the rule and its problems).

In English law, the original owner seems to be in a better position to claim ownership than the farmer; in French law, by contrast, the farmer could have an advantage. These two rules generate a very different ex ante allocation of property rights and incentives. The *nemo dat* rule, followed by traditional English law, avoids theft, since the person who acquires from the thief has no possible action against the true owner's claim.<sup>88</sup> The French rule, which protects the *bona fide* purchaser independently of the origin of the movable, reduces the investigation costs the potential purchaser must carry out.<sup>89</sup> Under French law, the original owner has to bear higher prevention costs to avoid the cattle being taken; otherwise, the likelihood of recovery is low.<sup>90</sup> Under English law, the farmer has to spend more resources in investigating the quality of the ownership status of the seller.<sup>91</sup> When the costs of prevention of theft are high, the English rule (*nemo dat*) is more efficient. By the same token, if the information costs concerning the right of the conveyor are significant, the French solution is more desirable.

In general, we expect prevention costs to be lower than title quality investigation costs.<sup>92</sup> Thus, we could argue that the French rule promotes market exchange, whereas the English rule delays or deters that exchange. This is a good micro example where the French rule is presumably more efficient (or at least more market friendly) than common law.<sup>93</sup>

The effect of such a rule seems to be clear. Under the traditional common law rule, owners can be confident in their ability to recover property that has been conveyed without their allowance.<sup>94</sup> At the same time, potential purchasers of goods have to always be aware of the identity of

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<sup>88</sup> See OGUS, *infra* note 93; Ogus, *infra* note 93.

<sup>89</sup> See OGUS, *infra* note 93; Ogus, *infra* note 93.

<sup>90</sup> See OGUS, *infra* note 93; Ogus, *infra* note 93.

<sup>91</sup> We do not take into account the protection against void or voidable contracts, that is to say, situations in which the law may refuse to give full effect to a contract on the ground of illegality, or on the ground of misrepresentation. Our point here is to show how the protection against acquisitions *a non domino* differs in civil law governed by the French rule and in common law. For more details on the protection in cases of void and voidable contracts, see GÜNTHER H. TREITEL, *LAW OF CONTRACT* 470-73 (Edwin Peel, ed., 12th ed. 2007).

<sup>92</sup> See OGUS, *infra* note 93; Ogus, *infra* note 93.

<sup>93</sup> See ANTHONY OGUS, COSTS AND CAUTIONARY TALES: ECONOMIC INSIGHTS FOR THE LAW, 45-47 (2006); Anthony Ogus, *What Legal Scholars Can Learn from Law and Economics*, 79 CHI.-KENT L. REV. 383, 394-95 (2004). However, in the context of ownership of art, see the opposite conclusion being defended by William Landes & Richard A. Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in, *ECONOMICS OF THE ART: SELECTED ESSAYS* (Victor A. Ginsburgh & Pierre-Micael Menger eds., 1996).

<sup>94</sup> See OGUS, *supra* note 93; Ogus, *supra* note 93.



the seller and the validity of her right to sell.<sup>95</sup> Obviously, the problem is more acute with movable property.

The weaker the protection that the *bona fide* purchaser has, the more important the proof and quality of title is to the purchaser. This increases the cost of each purchase in the economy, which potentially hurts trade. Such effect has forced many common law jurisdictions to restrict the extent to which current owners are protected. The nature of the market and the necessity of conducting quick and secure deals have introduced corrections to the protection of owners, and have effectively brought the common law rule closer to the French solution.

The best example of the aforementioned evolution is provided by section 2-403 of the Uniform Commercial Code (“UCC”). It provides an instructive exception to the historical common law tradition:

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
  - (a) the transferor was deceived as to the identity of the purchaser, or
  - (b) the delivery was in exchange for a check which is later dishonored, or
  - (c) it was agreed that the transaction was to be a “cash sale”, or
  - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant that deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.<sup>96</sup>

Therefore, the situation is that only under some special circumstances the rightful original owner is entitled to a claim against the person who bought with good faith.<sup>97</sup> In any other case, the *bona fide* purchaser is protected against the claims from the original owner. Hence, the UCC adopts an exception to the general common law principle. The UCC also seems to arrive at the general solution stated in section 2230 of the French Civil Code, according to which: “[o]ne is always presumed to possess for oneself, and in the capacity of an owner, where it is not proved that one has begun by possessing for another.”<sup>98</sup>

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<sup>95</sup> See OGUS, *supra* note 93; Ogus, *supra* note 93.

<sup>96</sup> U.C.C. § 2-403 (1952).

<sup>97</sup> See JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 103-04 (3d ed. 2002).

<sup>98</sup> Code Civil [C. civ.] art. 2230 (Fr.).

We now add the observation of the legal origins literature to this analysis: the French rule is enforced less effectively than the traditional English rule. The true original owner is the individual who needs an enforceable rule since the buyer has the possession of the good. Therefore, less effective enforcement of the French rule does not generate a major loss of efficiency, whereas more effective enforcement of the English rule increases the costs of investigation for the buyer. In fact, weaker enforcement is not a good method for ranking the efficiency of property law across legal families because it implicitly assumes that the substantive rules are equivalent, and only the degree to which they are enforced makes a difference. As we have seen with the example of *bona fide* purchasing, that is a misguided assumption.

### B. *Titling of Property*

Property rights are conveyed as a result of an exchange among people. As a consequence, it is crucial to determine who owns the right to control a certain resource or a specific good. At the same time, it is important to discover the ability of the owner to transmit or limit the use of the resource. This problem is common to movable property, as well as real estate property. In the latter case, given its costs and use as collateral in modern economics, it is more relevant to identify the owner and to know the legal status of the property in order to protect purchasers.<sup>99</sup> It is easy to understand that, in every legal system, a great part of the rules governing real estate property are intended to promote a reliable way to convey and exchange property.<sup>100</sup> The main goal involves the protection of potential purchasers and their ability to get loans.<sup>101</sup> As it is well known, real estate security and stability play a role of the utmost importance in economic growth.<sup>102</sup>

In this context, another good example in property law of the critical difference between common and civil law systems is the titling system of land recording versus registration.<sup>103</sup> In very broad terms, France uses a

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<sup>99</sup> CRIBBET ET AL., *supra* note 87, at 1070 (“The net effect of the system is to introduce by statute the equitable concept or bona fide purchaser for value without notice so that the b.f.p. takes free of prior deeds, mortgages, leases, etc., if they are not recorded as required by the particular act.”).

<sup>100</sup> See Arruñada, *supra* note 63.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Klaus Deininger & Gershon Feder, *Land Registration, Governance, and Development: Evidence and Implications for Policy*, 24 WORLD BANK RES. OBSERVER 233 (2009) (recognizing limitations to the literature that argues for land registration). See generally Arruñada, *supra* note 63; Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709 (2005); Benito Arruñada, *Property Titling and Conveyancing*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Henry Smith & Ken Ayotte eds., 2010).

recording system, whereas registration prevails in England.<sup>104</sup> The main difference between the two is that registration generates a provisional priority for claims, whereas recording does not.<sup>105</sup> As a consequence, in the case of a valid claim by a third-party, the current owner keeps the land under registration (the rightful claimant gets compensated by the public system of registration), whereas under recording, the current owner loses the land (but usually receives compensation if an insurance mechanism is in place).<sup>106</sup>

In this context, the American case does not provide a good benchmark. Both systems co-exist in the United States (for example, Cook County in the state of Illinois). Each state has adopted a register of deeds that aims to give potential purchasers and lenders constructive notice about the legal status of the property.<sup>107</sup> More generally, the American legal system, based on the general principle of the relativity of titles,<sup>108</sup> does not provide any kind of previous control or examination of the registered deeds.<sup>109</sup> Under the traditional rule of the common law, however, the superiority of one claim to another should be determined by temporal ordering.<sup>110</sup> The situation is quite different in many civil law systems, such as Germany or Spain, where land registries and *ex ante* controls over the legality and validity of deeds promote a safer system to convey real estate property.<sup>111</sup>

The alleged superiority of the registration system is not immune to criticism. Registration helps property transactions, as well as the use of

<sup>104</sup> See Arruñada & Garoupa, *supra* note 103.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See discussion by Arruñada, *supra* note 63.

<sup>108</sup> SINGER, *supra* note 97, at 99 (“The rules in force generally award both real and personal property to the prior peaceable possessor, even though she does not have title to the property. This result illustrates the concept of relativity of title.”).

<sup>109</sup> For a critical approach to the system, see CRIBBET ET AL., *supra* note 87, at 1119-22. See also *id.* at 1128 (“Most contracts for the sale of real estate require the vendor to convey a merchantable title to the purchaser. Unfortunately, this does not solve the buyer’s problem because the ownership of real property is so complex a matter the seller frequently does not know whether his title is ‘good’ or ‘bad.’ Moreover, once the deed is delivered the doctrine of merger ends most of the purchaser’s rights under the contract, and he must assure himself that the deed in fact conveys what he wants.”).

<sup>110</sup> See J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKER & PAULA A. FRANZESE, *PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS* 358-359 (3d ed. 2007) (“If A sold Blackacre to B, and then one day later sold it again to C, B would always prevail against C (short of C establishing title by adverse possession), because B’s claim was first in time. Similarly, if A executed a mortgage to B and then a second mortgage to C (which, unlike the first example, is perfectly legal), B would have first priority to any proceeds from the sale if it became necessary for her to foreclose against A.”).

<sup>111</sup> See Arruñada, *supra* note 63.

property as collateral, by reducing uncertainty.<sup>112</sup> However, it is a more expensive and demanding system because the cost of purging titles is not negligible.<sup>113</sup> Consequently, it could be that a more expensive system, such as registration, expels an important fraction of property from the public system. On the other hand, recording is a cheaper titling system, and therefore the fraction of property expelled from the public system is presumably lower.<sup>114</sup> Clearly, there is a trade-off between the assurance of quality of titling in land and the expulsion of property from the public system. From a theoretical perspective, it is not clear which titling system is better for the enforcement of property rights. Given the economic importance of titling systems for property and credit markets, there are good reasons to be cautious about endorsing the view that French law is inadequate.<sup>115</sup> In this context, the pure common law versus civil law distinction does not seem to be a relevant dimension for assessing the quality of titling of property.<sup>116</sup>

### C. Principle of Non Cumul in Torts and Contracts

Suppose a certain breach of contract configures a potentially tortious wrongdoing. A relevant legal question is the extent to which this breach of contract can be a cause of action concurrently in torts and contracts.<sup>117</sup> For example, this is the case in situations where breach of contract causes physical or emotional harm to the injured party.<sup>118</sup> Historically, product liability claims have generated the need for such a legal solution.<sup>119</sup> Such

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<sup>112</sup> See Arruñada & Garoupa, *supra* note 103.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See generally Arruñada, *supra* note 63.

<sup>117</sup> This example was originally mentioned by Garoupa, *supra* note 86. For the main differences between English and French contract law, see Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 3 J. Comp. L. 69 (2009) (arguing that in French law, facts and norms tend to be delineated, with the norms ultimately prevailing, while in English law, the line between facts and norms is blurred and factual arguments are relatively more important; and noting that contractual intention and contractual mistake are more practical concepts in English than in French law).

<sup>118</sup> See generally ERIC DESCHEEMAEKER, *THE DIVISION OF WRONGS: A HISTORICAL COMPARATIVE STUDY* (2009) (presenting an argument for incorporating this structure into the common law). For a general explanation on the *non-cumul*, see Geneviève Viney & Patrice Jourdain, *Les conditions de la responsabilité*, in *TRAITÉ DE DROIT CIVIL* 85, 85-93 (2d ed. 1998). Civil law, unlike common law, includes contracts and torts in the law of wrongs which is determined by different degrees of culpability (*dolus*, *culpa*, and *casus*).

<sup>119</sup> See *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (holding that the contractual relationship between the parties should not exclude a right of action based on negligence as between the same parties); SIMON DEAKIN,

situations posed the problem that the existence of a contract might ban the application of tort remedies. Tort remedies were designed for the absence of a previous relation among the tortfeasor and the injured party.<sup>120</sup> At the same time, legal remedies for breach of contract might be insufficient because the physical and emotional harm suffered by the victim is not one of the foreseeable outcomes in the context of a typical contractual relation.<sup>121</sup>

There are a few cases where the injured party can strategically choose to pursue breach of contract under contractual liability or tort liability (for example, in restitution).<sup>122</sup> However, in most cases, when the same harm or impairment can be regarded as either contract or tort, there are no general legal provisions.<sup>123</sup> Nevertheless, a contract cannot always generate a tort claim.<sup>124</sup> For purposes of the present study, we assume that there are particular situations when an injured party could strategically choose between pursuing compensation by contractual liability or by tort liability: a “picking the theory” choice.

Such situations raise two different, though related, questions. First, does the victim have two different claims against the same agent, one based on contractual remedies for breach of contract and another based on tort liability rules? If so, then can the victim claim both in the same cause of action? It is universally accepted that, in any case, the victim cannot recover twice for the same harm or detriment.<sup>125</sup>

Traditional civil law codes have disregarded these complex questions. Therefore, they have been addressed by case law.<sup>126</sup> In that respect, the problems related to the coexistence of tort and contract claims are a good field to compare the approaches by civil and common law. In both cases, the rules have their origin in judge-made law; hence, there are no struc-

ANGUS JOHNSTON & BASIL MARKESINIS, *MARKESINIS AND DEAKIN'S TORT LAW* 7-19 (2003); TONY WEIR, *ECONOMIC TORTS* 25 (1997).

<sup>120</sup> See DESCHEEMAER, *supra* note 118.

<sup>121</sup> The problem derives from one particular perspective, which is otherwise general to common and civil law legal systems. According to this general understanding, the main categories in private law are those related to the obligations borne by agreement, and those imposed without any voluntary consent from both parties. There are other ways to understand the relation among individuals with legal effects. See PETER S. ATIYAH, *ESSAYS ON CONTRACT* 10-15 (1986).

<sup>122</sup> See Stephen A. Smith, *Concurrent Liability and Unjust Enrichment: The Fundamental Breach Requirement*, 115 L. Q. REV. 245 (1999). In particular, if the facts satisfy the elements of two causes of action, a breach of contract can also support an act in tort, or vice-versa.

<sup>123</sup> See DESCHEEMAER, *supra* note 118; Smith, *supra* note 122.

<sup>124</sup> See DESCHEEMAER, *supra* note 118; DEAKIN ET AL., *supra* note 119; Smith, *supra* note 122.

<sup>125</sup> See generally Tony Weir, *Complex Liabilities*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW pt. 2 (André Tunc ed., 1973).

<sup>126</sup> See DESCHEEMAER, *supra* note 118; Viney & Jourdain, *supra* note 118.

tural differences in the process used to reach the legal solution—common law courts, as well as civil law judges, have selected the best solution in their own understanding. The latter, like the former, have done so without a general and preceding statutory rule.

Apparently the American and English regimes are more flexible in that respect.<sup>127</sup> The American approach is well stated by §378 of the Second Restatement of the Law on Contracts, according to which:

If a party has more than one remedy under the rules stated in this Chapter, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation.<sup>128</sup>

The traditional English rule, which holds that contractual and tort claims should not be filed in the same cause of action, was overruled by *Henderson v. Merrett Syndicates Ltd.* in 1995.<sup>129</sup> Before this decision, concurrent liability in both contract and tort had been accepted in claims for physical injury only.<sup>130</sup> The ruling opened the possibility for financial losses to the plaintiff. This ruling thus allowed one party to the contract to sue the other party for negligence in performing the contract, in addition to contractual remedies for breach of contract.<sup>131</sup>

In the same way, German<sup>132</sup> and Italian solutions<sup>133</sup> tend to consider tort and contract rules on damages as mutually complementary. The case is clearer in Germany, where the doctrine and case law have defined the

<sup>127</sup> See *Henderson v. Merrett Syndicates*, [1995] 2 A.C. 145 (H.L.) (appeal taken from Eng.); OGUS, *supra* note 93, at 88; RAYMOND YOUNGS, *ENGLISH, FRENCH AND GERMAN COMPARATIVE LAW* (2d ed. 2007); see also Jack Beatson, *Restitution and Contract: Non-Cumul?*, 1 THEORETICAL INQ. L. 83 (2000); WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 380-454 (1953).

<sup>128</sup> RESTATEMENT (SECOND) OF CONTRACTS § 378 (1981).

<sup>129</sup> *Henderson* 2 A.C. 145.

<sup>130</sup> See OGUS, *supra* note 93, at 92-94.

<sup>131</sup> See DONALD HARRIS, DAVID CAMPBELL & ROGER HALSON, *REMEDIES IN CONTRACT AND TORT* 575-78 (2d ed. 2002).

<sup>132</sup> The German solution allows concurrent claims in contract and tort. There are several reasons supporting that approach, namely because damages for pain and suffering are not available in a contract suit. See Gerhard Wagner, *Unerlaubte Handlungen*, in 5 *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band* 1495-1501 (2004). However, different limitations rules and a common reason for concurrent claims no longer hold after the 2002 changes.

<sup>133</sup> In Italian law, a wide range of (contractual) damages can be recovered in torts (non-contractual liability); although the defendant is not liable for every single consequence of breach, damages are not limited to foreseeable losses. Indirect damages are recoverable when they can be attributed to breach through standard principles of causation. Even future losses can be recovered, if they are based on an inevitable situation. See GUIDO ALPA & VINCENZO ZENO-ZENCOVICH, *ITALIAN PRIVATE LAW* 242-44 (2007).

situation as an *Anspruchkonkurrenz*—that is to say, the coexistence of different rules aiming at a similar goal (although not identical since the same type of damage cannot be recovered twice).<sup>134</sup>

The problem is not only a formal one regarding how to sum up a specific claim. The problem relates to the boundaries of the right of the victim (either of harm or of breach of contract) to recover damages, due to the different ways to consider contractual and tort damages in most of the legal systems.<sup>135</sup> Thus, it is clear that the wider the definition of tort is, the more important it is to limit it in order to avoid its accumulation with other claims, significantly those related with a contract.<sup>136</sup> From this point of view, it seems obvious that the French system has developed the opposite solution.<sup>137</sup> Different from the aforementioned solutions, under the French principle of *non-cumul*, a victim of breach of contract cannot pursue a tort claim concurrently; when an obligation exists by virtue of a contract, it cannot also exist in tort.<sup>138</sup>

As stated, the doctrine of *non-cumul* is a natural consequence of the definition of a tort under article 1382 of the French Civil Code: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” Independent of doctrinal and historical explanations, however, it is disputable that the common law rule of accumulation of contractual and non-contractual claims (also followed by some civil law jurisdictions) promotes more efficient results than the French doctrine of *non-cumul*.<sup>139</sup>

An efficiency approach should consider obligations contracted by mutual consent over other obligations. This principle underlies both the efficient formation and efficient breach of contracts. As a general principle, the use of tort law concurrently with contract law should be limited to specific situations where, for different reasons, we suspect contractual damages are unable to achieve the correct outcome. In other words, the efficient solution should look like a general principle of non-cumulative contractual and tort obligations with some particular derogation. Those familiar with contract law around the world will immediately recognize

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<sup>134</sup> See, e.g., NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 417-19 (3d ed. 2002).

<sup>135</sup> See Assunção Cristas & Nuno Garoupa, 2009, *On the Boundary between Torts and Contracts: An Economic View* in ECONOMIC ANALYSIS OF THE DCFR (P. Larouche & F. Chirico, eds. 2009).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., ANTHONY OGUS & MICHAEL FAURE, ÉCONOMIE DU DROIT: LE CAS FRANÇAIS (2002) (explaining the principle of *non-cumul*); Denis Tallon, *Contract Law*, in INTRODUCTION TO FRENCH LAW 205, 231 (George A. Bermann & Etienne Picard eds., 2008).

<sup>139</sup> We should note the criticism received by the *non-cumul* doctrine from some prominent French authors. See Jean Carbonnier, *Droit Civil*, in TOME 4: LES OBLIGATIONS 514-18 (2000).

that this general rule looks more similar to French law than to English or American or German law.<sup>140</sup>

The option for a principle of *non-cumul* seems wise from an economic point of view. First, obligations freely negotiated should supersede potential tortious wrongdoings. Second, the possibility that breach of contract could generate a tort claim undermines efficient breach.<sup>141</sup> Third, *ex ante facto*, a potential tort claim could deter formation of contracts or increase negotiation costs to overcome potential future tort claims.<sup>142</sup> As a consequence, allowing tort claims concurrent with breach of contract claims can only be efficient in very exceptional conditions. One example is when contractual damages are unable to internalize the losses of non-performance due to externalities or the existence of serious asymmetries of information that undermine the optimality of contractual rules.<sup>143</sup>

We can also consider the long-run effects of the different rules. Suppose there is an important type of breach of contract that generates significant losses of a tortious nature. If they can never be the subject of action concurrently in torts and in contracts, we expect the evolution of the law to be in such a way as to have this class included in a broader scope of contract law. Even if they are tortious in nature, the fact that they are a byproduct of a contract, and should only be cause of action in contract law, is likely to be appropriate because they are now subject to the mutual consent test.<sup>144</sup> If they can be causes of action concurrently in torts and in contracts, there would be no evolutionary pressure to subject them to a mutual consent test.

In French law, where *non-cumul* is the rule, a large body of law has evolved under contract law over the years to extend *responsabilité contractuelle* to include actions that are very substantively similar to tort law. Due to the *non-cumul*, such rules are housed within contract law. In other words, either the legal system sticks to the *non-cumul* under French law and accepts the growth of *responsabilité contractuelle* or the system decides that these cases must be dealt with as tort law cases despite the presence of a contractual relationship.

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<sup>140</sup> See OGUS, *supra* note 93, at 86-92. For example, the rule does not apply when the breach is a consequence of a criminal action. See Tallon, *supra* note 138.

<sup>141</sup> Unless contractual damages are too low and therefore tort damages operate as a mechanism to achieve efficient breach, an argument that seems quite difficult to make in general terms since expectation damages and specific performance tend to prevail.

<sup>142</sup> See OGUS, *supra* note 93, at 92-94.

<sup>143</sup> French law allows for derogation of the principle of *non-cumul* for reasons of public interest which could be interpreted as serious negative externalities. See OGUS AND FAURE, *supra* note 138, at 104.

<sup>144</sup> By mutual consent test, we understand that both sides agree voluntarily to the terms of the formalized contract.



The expansion of *responsabilité contractuelle* as a consequence of the *non-cumul* is not without costs. The potential inclusion of actions of a tortious nature in *responsabilité contractuelle* creates a difficult balance for civil courts. They have to assure that *responsabilité contractuelle* is, by and large, moving along the same lines as *responsabilité délictuelle* to deal effectively with cases that look more like torts than anything else (e.g., an injury to a contracting party in the course of executing a contract). Developing and administering that body of law has a significant cost. Obviously, that cost can be minimized by keeping the two liability regimes close to one another; however, the basic rule of *non-cumul* is then unnecessary.

Recognizing that the inclusion of actions of a tortious nature is likely to raise important questions in contract law, we are inclined to argue that the route taken by French law seems better, even from a dynamic perspective.<sup>145</sup> Our view is based on the nature of explicit mutual consent in contracts. The only exceptions should be damage situations that require high transaction costs to achieve mutual consent *ex ante*. Inserting these cases into a broader contractual responsibility would raise the problems of so-called quasi-contracts, either by diluting the definition of mutual consent or by increasing the costs of contractual formation since those transaction costs become part of the costs of contract formation.<sup>146</sup>

From an economic perspective, our conclusion is that the French model of a general principle of *non-cumul*, subject to particular derogations in order to address significant externalities, is more appropriate from both a static and dynamic perspective when compared to the solutions developed in the common law and civil law jurisdictions.

#### D. *The Good Samaritan Rule*

The Good Samaritan Rule provides another example of how the common law and civil law differ in their approaches and effects on efficiency.<sup>147</sup> The relevance of this example is probably marginal since it does not have immediate economic effects. However, it provides a good exercise in the context of our article. For example, the approach towards a duty to rescue varies under the common and civil law; while civil law

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<sup>145</sup> See, e.g., Peter Schlechtriem, *The Borderland of Tort and Contract – Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467 (1988) (defending the benefits of the *non-cumul* doctrine in international trade on the grounds that it avoids the risk of large claims of damages to international investors).

<sup>146</sup> See Cristas & Garoupa, *supra* note 135.

<sup>147</sup> For a general overview of the French tort system, its influence on civil law, and its differences with the common law, see ANDRÉ TUNC, *LA RESPONSABILITÉ CIVILE* (2d ed. 1989).

systems tend to impose a duty to rescue to everyone, the traditional common law solution foresees a no-duty-to-rescue rule.<sup>148</sup>

Under the realm of traditional common law rules, there is no affirmative duty to rescue another person from a situation of danger; Anglo-American courts do not impose a duty to rescue on bystanders.<sup>149</sup> The rule has few exceptions and is almost universally accepted—exceptions are roughly related to situations of risk negligently created by the potential rescuer or with the existence of a special relationship between the potential rescuer and the rescuee.<sup>150</sup> In the vast majority of cases, no person has an obligation to save another, even when the probability of salvation is high and its costs are small. Therefore, the lack of a duty to rescue creates an immediate disincentive to rescue: those who might want to rescue somebody in a risky situation may not carry out those danger-

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<sup>148</sup> KENNETH S. ABRAHAM, *THE FORM AND FUNCTIONS OF TORT LAW* 234 (3d ed. 2007) (“As a matter of principle, the common law cares enough about individual liberty that typically it does not ask people to do more than mind their own business. If I have done nothing to put someone in a position of danger, I have no duty to rescue him from that position.”). See generally *THE GOOD SAMARITAN AND THE LAW* (James M. Ratcliffe ed., 1981) (discussing the traditional explanation of the rule and its implications); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986) (explaining the common law rule from a comparative perspective).

<sup>149</sup> Such result obviously has some critics among common law scholars. See e.g., MARY ANN GLENDON, *RIGHT TALKS: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 84 (1991) (arguing that the rule is the result of the “extreme individualism typical of Anglo-Saxon legal thought”); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 248 (1980) (arguing in favor of the recognition by the courts of a general duty to rescue, and even noting that, “On the judicial side, many of the outposts of the doctrine that there is no general duty to rescue have fallen. Recognizing the meritoriousness of rescue and the desirability of encouraging it, the courts have increasingly accorded favorable treatment to injured rescuers.”). In fact, some states in the U.S. have passed statutes imposing a general Good Samaritan rule. There are only few exceptions to the rule according to which there is no general duty to rescue. Such exceptions imply a duty to affirmative action have been formalized by practice and judicial decisions over the years. The most comprehensive outlook is in the Restatement. See *RESTATEMENT (SECOND) TORTS*, §314A & 314B (1979) (recognizing five situations of an affirmative duty to rescue: (1) carrier-passenger, (2) innkeeper-guest, (3) landowner-invitee, (4) custodian-award, (5) employer-employee).

<sup>150</sup> See *Stockberger v. United States*, 332 F.3d 479, 481 (7th Cir. 2003) (Judge Posner wrote that “various rationales have been offered for the seemingly hardhearted common law rule: people should not count on nonprofessionals to rescue; the circle of potentially liable nonrescuers would be difficult to draw . . . ; altruism makes the problem a small one and liability might actually reduce the number of altruistic rescuers by depriving people of credit for altruism.”).

ous activities after all. Those risky activities, however, can be socially beneficial.<sup>151</sup>

The traditional civil law approach differs from the traditional common law rule. Under the civil law, there is a general duty to rescue persons in danger, but the rescuee has to pay the rescuer for the expenses of the salvation.<sup>152</sup> The duty to rescue, the Good Samaritan Rule, is even enforced in the context of criminal law.<sup>153</sup> This general rule has few exceptions, and all of them relate to situations where it is more than foreseeable that the rescue will be unsuccessful.<sup>154</sup> The duty is not imposed where the cost of the rescue is excessive, although this exception is seldom used when the danger involves a natural person.<sup>155</sup> In doing so, civil law systems impose a liability rule on the potential rescuer, who will be liable if the rescue is not performed. It also imposes another liability rule to the rescuee, who has to reward or reimburse the rescuer with the expenses of the rescue.

Clearly, the civil law solution is superior and provides a more efficient framework to secure an implicit negotiation with high transaction costs.<sup>156</sup> The two-sided liability rule promotes rescues that can be performed at a low cost, but at the same time generates incentives for taking precautionary action, since the person in peril knows that she has to pay for the costs of her own rescue.<sup>157</sup> Both actors are fully incen-

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<sup>151</sup> *But cf.* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 126 (1978) (suggesting that “the results under the common law, occasionally imposing liability but mostly denying it, may be consistent with efficiency”); Sophie Harnay & Alain Marciano, *Should I Help my Neighbor? Self-Interest, Altruism and Economic Analyses of Rescue Laws*, 28 EUR. J. LAW ECON. 103 (2009).

<sup>152</sup> *See* Landes & Posner, *supra* note 151; Harnay & Marciano, *supra* note 151.

<sup>153</sup> *See generally* F. J. M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

<sup>154</sup> *See* Landes & Posner, *supra* note 151; Harnay & Marciano, *supra* note 151; Feldbrugge, *supra* note 153.

<sup>155</sup> *See* Landes & Posner, *supra* note 151; Harnay & Marciano, *supra* note 151.

<sup>156</sup> For an empirical analysis and discussion, see David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653 (2006).

<sup>157</sup> DONALD A. WITTMAN, *ECONOMIC FOUNDATIONS OF LAW AND ORGANIZATION* 176 (2006) (“The continental rule encourages low-cost rescues in two ways. First, the rescuer is compensated for the small cost of rescue; second, if the potential rescuer’s costs are somewhat higher than the average so that the reward does not fully cover all rescuers’ costs, then the threat of being liable for damage to the potential rescuee will motivate the person to the rescue. The rule also provides the appropriate incentives for those who might need rescue. By charging for the average of the rescue, the rescuee takes the appropriate level of care. A higher price for rescue would result in the potential rescuee being overly cautious and too few rescues.”). For a study on the evolution of the different understandings of the civil

tivized to perform adequately, from both individual and social perspectives.<sup>158</sup>

#### IV. LEGAL GOVERNANCE AND THE SPECIALIZATION OF COURTS

While Section III looked at examples in substantive law that seem to be more appropriately addressed by French law rather than by common law (and with implications for economic performance), in this section we look at court structure and organization. As mentioned above, although the influence of these variables on economic growth is controversial, they have been part of the argument against the efficiency of French civil law. In particular, it has been suggested that the model of court specialization followed in France is not conducive to economic growth.<sup>159</sup>

##### A. *The Model*

We start by developing a framework that will be used to assess the different degrees of specialization of courts and legal governance across legal families. We then assess applications to administrative, commercial and constitutional laws.

The main costs and benefits of specialized courts are summarized in Table 1. Obviously, a specialized jurisdiction could assure correct and legally coherent decisions in a complex area given the difficulties in establishing liability and the technical nature of the underlying facts. This argument only makes sense if the determination of one particular class of liability is substantively different from other existing types of liability, in particular, within private law.

A related argument is that the quality of decisions increases due to competitive pressure. A specialized jurisdiction in direct competition with regular courts should develop structural qualities to be more innovative and more persuasive, and to develop more appropriate legal doctrines.<sup>160</sup>

A different advantage is the uniformity of judicial decisions. Absent inter-circuit *stare decisis*, uniform interpretation of federal administrative

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law rule and its economic implications, see Harnay & Marciano, Harnay & Marciano, *supra* note 151.

<sup>158</sup> The critique by some scholars who argue that the Good Samaritan rule would require, as a natural extension, the duty to give charity to the poor is economic nonsense. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Such a statement can be done only from the misunderstanding of the proximate causation doctrine.

<sup>159</sup> See, e.g., Mahoney, *supra* note 55.

<sup>160</sup> See, e.g., Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument From Comparative Law*, 35 HASTINGS CONSTIT. L.Q. 401 (2008) (arguing that multiple higher courts provide a better framework for interpretation, and that, each high court has to persuade the other higher courts of the correctness of their arguments).

law is usually presented as an argument for specialization. This is not an issue in French law given the position enjoyed by the *Conseil d'État*. It is plausible that uniformity over some areas of the law is more important than over other areas because of the social, political, economic, or budgetary implications of adjudicating liability.

Another argument is court workload, in particular when we have court congestion with an increased volume of litigation and a potential reduction in quality in sentencing as a response.<sup>161</sup> In other words, the need to keep high quality generalist courts might justify transferring jurisdiction of certain areas of the law to specialized courts.<sup>162</sup> In fact, one should note that by alleviating the docket loads of regular courts, one expects to increase the general understanding of the law (due to fewer people writing about the same law), and this leads to less litigation and less workload in the future.<sup>163</sup> The natural question is why transfer one particular area of the law but not other relevant areas? The answer seems to be that what should be transferred are cases characterized by a high volume of routine cases with significant workload for regular courts.

In addition to pure efficiency considerations of specialization, there might be political economy arguments as well. The standard justification for why administrative bodies cannot adjudicate administrative or constitutional liability is due to their lack of impartiality since they combine rulemaking, adjudication, and enforcement functions.<sup>164</sup> The creation of specialized courts to deal with this type of liability could be part of a broader course of action that effectively reverses the process of delegation of authority to administrative agencies.<sup>165</sup> Yet, it is not obvious why specialized courts would be willing to confront the administration more frequently than regular courts.<sup>166</sup> In other words, it could be that specialized courts are more willing to impose liability than traditional administrative or executive agencies, but the relevant comparison should be between specialized and generalist courts. Furthermore, if specialized courts are to be used as a mechanism to limit administrative authority, they could generate a backlash in terms of future delegation or new legislation. Another line of reasoning is to argue that specialized courts, by limiting and supervising agencies, reduce the need for further administra-

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<sup>161</sup> See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1989).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Nuno Garoupa, Anthony Ogus & Andrew Sanders, *The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?*, 70 CAMBRIDGE L.J. 229 (2011).

<sup>165</sup> This is due to the fact it reallocates some of their competences to the benefit of the courts. See generally Giuseppe Dari-Mattiacci, Nuno Garoupa & Fernando Gómez-Pomar, *State Liability*, 18 EUR. REV. PRIVATE L. 773 (2010).

<sup>166</sup> Under the capture hypothesis, specialized courts might be less willing to do so. See *id.*

tion supervision, and therefore provide a good signal of which areas of the administration are more prone to generate liability.

Capture is the standard argument against specialization.<sup>167</sup> It can take place at the appointment level.<sup>168</sup> Dependence on a specialized bar or of a specialized judicial council might create devices by which the interests of the administration can make its influence felt in the appointment mechanism. Capture can also take place at the level of the adjudication.<sup>169</sup> There are very strong arguments to consider capture of specialized courts as a major issue.<sup>170</sup> The costs of capturing are lower given the specificity of the issues at stake and the relatively low chances of being exposed. On the other hand, the perspective of specialized judges forming a cohesive group, fairly insulated from other magistrates and less likely to be accountable, increases potential benefits. Finally, in the case of administrative and constitutional laws, we might suspect important structural biases. Indeed the influence of the government and of special interests will tend to align the profile of the state bureaucracy with that of the specialized bench.<sup>171</sup> We could say that many of the particularities of administrative procedure are in part consequences of this alignment.

There is also the possibility of internal capture or the development of vested interests.<sup>172</sup> Courts could behave strategically as any other bureaucracy and push for expansion of budgets and resources, attract new business to justify their existence, or develop confusing and incoherent procedures (discovery, pleading or trial methods) that make cross-relationships unproductive (therefore keeping the monopoly of specialized courts over a particular subject matter). A potential ratchet effect should also not be neglected. Specialized courts could push for idiosyncratic procedures, a specialized bar, and hence a particular market for legal services. Thus, this might create a completely different legal environment for some areas of the law. Finally, the highly significant influence of specialized courts on a particular area of the law (both substantively and procedurally) reduces effective supervision by higher regular or generalist courts. For instance, such ineffective supervision increases the possibility of mistakes that will exacerbate the need for new legislation.

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> For instance, court capture by interest groups has been considered one of the critical factors explaining the expansion of patent rights in the U.S., after the creation in 1982 of the U.S. Court of Appeals for the Federal Circuit. The latter concentrates jurisdiction over appeals from the Patent and Trademark Office as well as from federal district courts in patent infringement cases. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 334-53 (2003).

<sup>171</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>172</sup> *Id.*

Many of the benefits and costs are exacerbated if adjudication is assigned to specialized courts on the basis of exclusivity and limitation.<sup>173</sup> Similarly, this may apply if specialized courts are staffed with specialized judges rather than generalist judges.<sup>174</sup> Increased collegiality of the specialized judiciary promotes faster learning in specific areas of the law, but generates two important drawbacks.<sup>175</sup> First, a specialized bench might not enjoy the reputation of being considered a generalist judiciary; hence, an adverse selection effect might take place (it could be harder for specialized courts to attract talent).<sup>176</sup> Second, a specialized bench might have to interact with higher courts staffed with generalist judges.<sup>177</sup> This hierarchical relationship might create serious conflicts, especially because the use of particular procedures in specialized courts (that is, procedures that are modified for specific goals) might disturb the whole court system.<sup>178</sup>

Having reviewed the general model, we turn now to three examples that are relevant in France, namely the administrative, commercial and constitutional courts.

### B. *Administrative Courts*

Some legal scholars consider the separation of jurisdiction between civil and administrative courts in the French tradition as an example of inefficiency in legal governance.<sup>179</sup> A standard criticism is that the administrative jurisdiction lacks true independence to review the acts of the executive effectively.<sup>180</sup> From an economic perspective, we can say that French-style administrative courts are likely to be captured by the government and therefore cannot effectively restrain the government from potentially undermining private property rights.<sup>181</sup> In fact, capture might simply result from some hindsight bias by which administrative courts have difficulties to envisage that the state might have overreached (in relation to the appropriateness of intervention), either because of a cognitive bias (e.g. the existence of the state is not to be questioned) or more simply because of self-preservation as state officials.<sup>182</sup>

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<sup>173</sup> See Revesz, *supra* note 161 (discussing terminology; exclusivity means that specialized courts hear every case of a particular area of the law whereas by limitation we understand that specialized courts hear only cases of a particular nature).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., Mahoney, *supra* note 55; Garoupa, *supra* note 86.; see also Dari-Mattiacci et al., *supra* note 165.

<sup>180</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Although such argument is subject to empirical controversy (for example, it is unclear that the *Conseil d'État* has a significant pro-government bias<sup>183</sup>), let us assume for the sake of discussion that this is true. Nevertheless, capture is one of the well-known costs of specialization as clarified by the general model.<sup>184</sup> Therefore, the French approach must be assessed and configured in a framework that recognizes the benefits of specialization versus the costs of capture, rather than a mere misguided *ceteris paribus* analysis of the potential losses of a dual jurisdictional organization.<sup>185</sup>

Better training, better particularized information, tailored procedures in court to deal with the special features of the state as defendant or as plaintiff, and better technology in evidence production are possible when judges have the training and the incentives to become specialists in administrative law.<sup>186</sup> On the other hand, separation makes capture by the government or by special interests easier.<sup>187</sup> Also, specialization makes accountability more difficult.<sup>188</sup> The knowledge of administrative law becomes a specific asset in human capital for the judges.<sup>189</sup> Therefore, they are more dependent on (or more easily constrained by) the government (state officials).<sup>190</sup> The marginal cost for a judge of deciding against the state or the government is much higher in administrative courts than in ordinary judicial courts.<sup>191</sup> If specialization is more important than capture—that is, the benefits from specialization outweigh the costs of capture—then administrative courts should exist for purposes of enforcing and interpreting administrative law.<sup>192</sup>

Some cases in administrative litigation share a substantial portion of legal issues with ordinary tort cases (causation, proximate causation, determination of fault, estimation of harm), thus decreasing the benefits of having specialized courts in administrative law deal with these cases.<sup>193</sup> It is true, however, that other cases share fewer issues with ordinary tort cases among private individuals or firms (for example, the illegal denial

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> The institutional design is relevant in order to mitigate conflicts of jurisdiction and of law; an example is the French *Tribunal des Conflits*.

<sup>187</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g., Richard Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983); Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

<sup>193</sup> See Dari-Mattiacci et al., *supra* note 165.



of permits or licenses).<sup>194</sup> The extent to which complexity in administrative law is intrinsic to determining liability when the state is the defendant or the plaintiff is inevitable in this context.<sup>195</sup> Necessarily, we do not consider this argument to be overwhelming. For example, a special treatment of state liability for provision of private goods does not seem to satisfy the argument for a specialized jurisdiction.

Once the costs and benefits are identified, the calibration of the cost-benefit analysis must take into account that the French approach is adequate under some conditions and inadequate under others.<sup>196</sup> It could be that a dual jurisdictional organization is the best solution in France, but not in England or America. If such analysis is true, then evaluating French-style administrative courts from an incomplete or partial cost-driven perspective is methodologically incorrect. The existing trade-off between specialization (better knowledge of administrative law and more adequate procedural rules) and capture (loss of independence) could have different optimal responses across legal families.

In our view, the striking difference between a specialized court system for administrative law of the French type and another one for the common law does not necessarily mean that one arrangement is superior to the other. We argue that there are certain characteristics of the French system that might justify its design being used for certain jurisdictions. The most immediate argument is the general complexity of administrative law.<sup>197</sup> Here, one should look not only at the overall complexity, but also at the variance within the field of administrative law. Administrative law has many subfields such as state liability, review of agency regulations, and public employment rules. The variance of complexity across subfields is important to determine benefits. The higher the variance in the legal issues across different types of administrative law cases, the higher the

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<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., John Bell, *Administrative Law in a Comparative Perspective*, in *COMPARATIVE LAW: A HANDBOOK* 291-93, 299 (Esin Örüçü & David Nelken eds., 2007). Professor Bell recognizes that the major advantage of separate administrative courts is the possibility to develop a set of principles that accepts the specific nature of the state as defendant or as plaintiff (access to information, evidence produced by the administration, control over administrative discretion) balancing the interests of citizens and the ability of the administration to pursue the public interest. According to Professor Bell, the main disadvantages are potential conflicts of jurisdiction that require another special court to solve them, the *Tribunal des Conflits*.

<sup>196</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>197</sup> See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* (2d ed. 2008); see also JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* 47-49 (2006). Professor Bell emphasizes that administrative law includes different rules within public law, including contract with public authorities, liability of public authorities, and employment within public administration. The substantial workload of administrative courts in France is partially explained by the principle of right to appeal in facts and in points of law.

benefits of specialization.<sup>198</sup> To this legal complexity, one needs to add the assessment of state actions that are market-oriented in economic nature but of legal public nature (public provision of public goods and services).

A second argument that distinguishes France (and other continental jurisdictions) from Britain or America is the strong state intervention in the economy (larger size of public sector) and in society (regulation of social life). A strong state intervention increases the complexity of administrative law and the likelihood of litigation between private citizens and the state, *ceteris paribus*.<sup>199</sup> Notice that the argument is positive, not normative, in the sense that we are not discussing the merits and demerits of a strong state intervention. We are merely arguing that a strong state intervention naturally leads to a more complex and relevant administrative law.<sup>200</sup>

A third related argument is strong and substantial public employment. It is likely that important conflicts between unionized public workers and the government (as an employer) require more effective administrative courts. Again, our argument is not normative (whether or not a large sector of unionized public employment is beneficial or detrimental for economic growth), but merely positive.

Finally, we need to add a weak system of independent regulatory agencies. These agencies play an important role in providing expertise on administrative law in their own fields of regulation.<sup>201</sup> They also provide informal review of administrative justice.<sup>202</sup> The judiciary would, in general, be less distrustful of an independent agency than of purely political decisions from an administrative agency.<sup>203</sup> Hence, where we find strong and independent expert agencies, we expect less need for specialized administrative courts. Independent expert agencies and specialized administrative courts are, to some degree, institutional substitutes, both in terms of enforcing administrative law and in their political indepen-

<sup>198</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>199</sup> *Id.*

<sup>200</sup> This point was echoed by DAM, *supra* note 56, at 118-20 (referring to the significant size of the public sector and the potential need for specialized administrative review). See also BELL, *supra* note 197, at 289-93 (discussing healthcare, education, housing, social security and infrastructure). It could be that a large public sector is negatively correlated with growth, but in this case the choice of court structure is a mere response to a political preference and not itself negatively correlated with growth. In fact, if our argument is correct, an alternative court structure on the lines of common law jurisdictions would be second-best and hence further contribute to the negative correlation between a large public sector and economic growth.

<sup>201</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

dence from the executive.<sup>204</sup> Note that our conclusion looks at independent regulatory agencies and specialized courts as providers of high quality reviews of administrative decisions. A different viewpoint refers to accountability where the appeals process plays an important role in keeping independent regulatory agencies constrained.<sup>205</sup>

Altogether, there are good reasons to be cautious and not to jump to the conclusion that the French-style administrative courts are inefficient and detrimental to economic growth.<sup>206</sup> On the contrary, though, the abolition of a separate administrative jurisdiction without further profound legal reforms could be quite disastrous in civil law countries of the French tradition.

### C. Commercial Courts

The *lex mercatoria* and the consequent enforcement by specialized courts within the trade guilds have always attracted legal historians and economists.<sup>207</sup> The economic advantages of a specialized court system tailored and developed by businessmen to resolve their litigation accord-

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<sup>204</sup> See Jean-Michel Josselin & Alain Marciano, *The Paradox of Leviathan: How to Develop and Contain the Future European State?*, 4 EUR. J. L. & ECON. 5 (1997) (emphasizing the advantages of the French type of administrative law in restraining the state).

<sup>205</sup> See Dari-Mattiacci et al., *supra* note 165.

<sup>206</sup> Part of the argument against the French solution is derived from a general dislike of French administrative law by Anglo-American legal scholars. See ALLISON, *supra* note 50, at 157-58 (arguing that the Anglo-American understanding of French administrative law and courts is flawed). Allison blames Dicey who, in 1885, wrote that administrative law is incompatible with the English tradition (in his Lectures Introductory to the Study of the Law of the Constitution). Dicey changed his mind later by recognizing the modern French administrative law addressed important concerns and was not necessarily incompatible with the rule of law. *Id.* at 161. In fact, different constitutional law arrangements could demand stronger administrative law and Dicey ignored this point as do many recent Anglo-American scholars. Proposals for separate administrative courts in Britain were rejected in the mid 1930s (including an English *Conseil d'État*) but administrative tribunals have proliferated as governments got bigger, as we suggest they should.

<sup>207</sup> See, e.g., J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979); Richard A. Epstein, *Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004); Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist with Its Own Petard?*, 5 CHI. J. INT'L L. 67 (2004); Roger B. Myerson, *Justice, Institutions and Multiple Equilibria*, 5 CHI. J. INT'L L. 91 (2004); Avner Greif, *Impersonal Exchange Without Impartial Law: The Community Responsibility System*, 5 CHI. J. INT'L L. 109 (2004); Avinash Dixit, *Two-Tier Market Institutions*, 5 CHI. J. INT'L L. 139 (2004).

ing to their own laws have been documented.<sup>208</sup> They are easily framed in our model as summarized by Table 1, including specialization in substance and in procedure that provides high quality decisions in a pro-market setting with little intervention by the state. The quality of business courts relies on reputation and self-regulating mechanisms that avoid the standard capture problem.<sup>209</sup> The economic argument for these decentralized business or industry courts has been made not only in the context of the Middle Ages' *lex mercatoria*,<sup>210</sup> but also in relation to more recent experiences, where legal informality, a business background, and a significant experience with merchant practices tend to prevail after the gradual professionalization of the judiciary.<sup>211</sup>

The general appraisal by legal economists for merchant courts has neglected the French case of commercial courts (*Tribunaux de commerce*).<sup>212</sup> It is a system of courts that can be traced back to 1563 and survived the important reforms of the French court system.<sup>213</sup> The enforcement of the 1807 *Code du commerce* was entrusted to these

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<sup>208</sup> See, e.g., AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM THE MEDIEVAL TRADE 391-95 (2006); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); Avner Greif, Paul Milgrom & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Avner Greif, *Institutions and Impersonal Exchange: From Communal to Individual Responsibility*, 158 J. INSTITUTIONAL & THEORETICAL ECON. 168 (2002).

<sup>209</sup> See sources cited *infra* note 208.

<sup>210</sup> Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999) (arguing that differences between law codes did not pose a substantial problem and that mercantile guilds developed, not to provide institutions comparable to the modern *lex mercatoria*, but rather to supply protection, as a result of which the importance of universally accepted commercial institutions in the Middle Ages has hitherto been vastly misperceived).

<sup>211</sup> See, e.g., Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & Econ. 215 (1994); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating The New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003); Mark D. Rosen, *Do Codification and Private International Law Leave Room for a New Law Merchant?*, 5 CHI. J. INT'L L. 83 (2004); Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L. 157 (2004); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007).

<sup>212</sup> But see AMALIA D. KESSLER, A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE 286-97 (2007) (discussing the French commercial courts from an economic perspective).

<sup>213</sup> See BELL, *supra* note 197.

courts, which are staffed only by litigation attorneys who deal with commercial matters.<sup>214</sup> Members of the local chamber of commerce elect these lay judges for terms of four years after they have been practicing as businessmen for at least five years.<sup>215</sup> In the court, they sit in panels of at least three.<sup>216</sup> Commercial litigation is dominated by oral proceedings, unlike the general arrangements in the civil law tradition.<sup>217</sup> They are considered to be reasonably fast as compared to the regular courts.<sup>218</sup> Finally, there are also few appeals to the *Cour d'appel* and even fewer reversals.<sup>219</sup>

It is difficult to find a better example on a large scale of business courts than the French commercial courts. Yet legal economists have largely neglected their existence and importance in the context of French commercial law.<sup>220</sup> Notice that the existence of these specialized courts is not without problems, as shown in the context of our model. They also have their limitations since they are bound by substantive commercial law.<sup>221</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> Only the court recorder (*greffier*) has legal training. See BELL ET AL., *supra* note 197, at 62-63, 77.

<sup>216</sup> Simple cases are heard by the president and around 30% by the three judge panel. See *id.* at 45-48.

<sup>217</sup> See BELL, *supra* note 197.

<sup>218</sup> *Id.*

<sup>219</sup> See BELL ET AL., *supra* note 197, at 48.

<sup>220</sup> On the development of judge-made commercial law in England and in France not being significantly different, see Gino Gorla & Luigi Moccia, *A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16th-19th Century)*, 2 J. LEGAL HIST. 143, 149 (1981).

<sup>221</sup> See Nicholas H. D. Foster, *Comparative Commercial Law: Rules or Context?*, in *COMPARATIVE LAW: A HANDBOOK* 271-72 (Esin Özücü & David Nelken eds., 2007). Professor Foster discusses the law regarding the facilitation and regulation of commerce. He acknowledges that both in common and civil law, commercial law is based on the *lex mercatoria*. However, the path taken is significantly different. With respect to English law, commercial law based on the *lex mercatoria* gradually disappeared and was inserted into common law by professional judges. In turn, such movement increased the need of merchants as juries or helping more directly the court. The system received statutory regulation by the Sale of Goods Act 1893, the Partnership Act 1890, the Bills of Exchange Act 1882 and Marine Insurance Act 1906, all influenced to some degree by Continental law. Statute law recognizes the autonomy of business law, the legal principle of encouraging commerce, and the conventional common law pragmatism with flexibility dominated by commercial lawyers. French law has followed a different path. Commercial law was developed separately from civil law influenced by the growing through trade within Europe. It was based on statutory law of Italian cities and Roman law, centralized by government with the ordinances of 1673 and 1681 (*Ordonnance sur le commerce de terre* and *Ordonnance sur la marine*). Before codification, French law was superior in terms of flexibility since it was subject only to lay commercial courts which were innovative. Influenced by civil law, the 1807 commercial code was based on the old

Nevertheless, they have the ability to effectively improve enforcement and to develop creative procedural rules.<sup>222</sup>

From an economic perspective, and relying on the enthusiasm for business courts promoted by legal economists, we can only say that the French commercial courts are certainly among the best institutional arrangements in the world to deliver commercial law.<sup>223</sup> A comprehensive assessment of the comparative quality of commercial law is inevitably compromised if it fails to recognize the significant advantages of the French commercial courts. We are not saying that French commercial courts are superior to the use of commercial arbitration in common law jurisdictions. We merely point out that a comparative analysis that neglects the role and the nature of the French commercial courts fails to recognize the advantages posed by this institutional design.

#### D. Constitutional Courts

Constitutional law is a central element in determining the various dimensions of political and legal reform. This is because constitutional adjudication should be more responsive to long-run interests and less limited by political short-run opportunism.<sup>224</sup> Therefore, conformity with the constitution becomes an important instrument to achieve political and

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ordinances but was outdated soon, and new legislation amended the code until its replacement in 2000.

<sup>222</sup> In fact, proposals for professionalization of the commercial judges have failed so far. See BELL ET AL., *supra* note 197, at 48; Loïc Cadiet & Soraya Amrani-Mekki, *Civil Procedure*, in INTRODUCTION TO FRENCH LAW 311 (G. A. Bermann & E. Picard eds., 2008) (noting proposals to convert the commercial courts into mixed courts with professional judges have been dropped). Most of the criticism directed at commercial courts was derived from a general perception that they were excessively captured by particular business interests in the context of bankruptcy litigation.

<sup>223</sup> Notice that they are unique among countries of French legal tradition, thus also showing the problems of generalizations. See, e.g., Hans Ulrich Walder-Richli, *Law of Civil Procedure*, in INTRODUCTION TO SWISS LAW 289 (F. Dessemontet & T. Ansay eds., 3d ed. 2004) (discussing the Swiss case); Jean Laenens & George Van Mellaert, *The Judicial System and Procedure*, in INTRODUCTION TO BELGIAN LAW 86 (Hubert Bocken & Walter De Bondt eds., 2001) (discussing the Belgian case). In four Swiss cantons (including those covering Zurich and Berne), there are specialized commercial courts if the action involves important transactions and at least the defendant is listed as a firm in the Swiss commercial register. They have two professional judges and three business assessors drawn from the local business community. They function as experts. In Belgium, there is a commercial court in every judicial district with jurisdiction over commercial litigation. They have professional judges (including the president of the court) and lay judges who assist the president of the court.

<sup>224</sup> See, e.g., Rafael La Porta, Florencio López-de-Silanes, Cristian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004).

economic stability.<sup>225</sup> Moreover, empirical economic analysis supports the view that independent courts and constitutional review are factors that should be taken into account not only if the goal is to guarantee political freedom, but also to protect economic liberties and foster economic growth.<sup>226</sup>

The design of most constitutional courts in civil law countries has been influenced by the ideas and legal theories of Hans Kelsen.<sup>227</sup> Many countries have adopted his “negative legislator” model.<sup>228</sup> In his view, ordinary judges are mandated to apply law as legislated or decided by the parliament.<sup>229</sup> There is a strict hierarchy of laws that makes judicial review by a constitutional court incompatible with the subordination of the ordinary judges to the legislator.<sup>230</sup> Hence, only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional legislator. The Kelsenian model proposes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review.<sup>231</sup> This body, conventionally called the constitutional court, operates as a negative legislator because it has the power to reject legislation (but not propose legislation).<sup>232</sup>

In fact, the centralization of constitutional review in a body outside of the conventional judiciary has been important to secure independence and the commitment to democratization after a period of an authoritarian government in many countries.<sup>233</sup> The judiciary is usually suspected of allegiance to the former regime, and hence, a new court is expected to be more responsive to the democratic ideals contemplated in the new constitution.<sup>234</sup>

The application of the Kelsenian model in each country has conformed to local conditions, and therefore, the competences and organization of constitutional courts are usually much broader than a simple “negative

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942). See generally ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000).

<sup>228</sup> See, e.g., GINSBURG, *infra* note 234; SWEET, *supra* note 227. The notion of a “negative legislator” is based on the idea that the court expels legislation from the system and therefore shares legislative power with the parliament. Kelsen, *supra* note 227, at 193-94.

<sup>229</sup> Kelsen, *supra* note 227, at 194-97.

<sup>230</sup> See generally SWEET, *supra* note 227.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* Examples include the cases of Portugal, Spain and most Central and East European countries.

<sup>234</sup> See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 9-10 (2003).

legislator."<sup>235</sup> Ex ante review of legislation (i.e., before promulgation) has been extended to ex post review (i.e., after promulgation) in many countries.<sup>236</sup> Abstract review (traditionally in France) has been conjugated with concrete review in Germany or Spain.<sup>237</sup> Most constitutional courts have expanded ancillary powers in different, but important, areas such as verifying elections, regulating political parties (illegalizing them or auditing their accounts), and performing other relevant political and administrative functions, such as performing as acting as a judicial council, as seen in Taiwan.<sup>238</sup>

The Kelsenian-type courts for constitutional review now exist now in most countries of the civil law tradition, with the Netherlands, the Scandinavian countries, and most Latin American countries being the most striking exceptions.<sup>239</sup> Also, most Central and Eastern European former communist countries have now developed a similar institutional structure.<sup>240</sup> Nevertheless, the institutional design followed in Germany and in Spain broadens the initial Kelsenian model, whereas the traditional French model (before the 2008 reform), with narrower competences and almost exclusively preventive review, offers less than what is expected from a Kelsenian-type court.<sup>241</sup> Indeed, the Austrian model of the early 1920s limited constitutional review to abstract review of the legislation, but incidental referrals that effectively provided for concrete review were introduced soon after in the 1930s.<sup>242</sup>

It then becomes a question of cost-benefit analysis of the option for the Kelsenian model versus the American model.<sup>243</sup> The general nature of the costs and benefits of court specialization in constitutional law follow the model specified in Table 1 and discussed above. The Kelsenian model offers a specialized constitutional court that presumably can offer high quality decisions in a more coherent and uniform way.<sup>244</sup> The cost is the detachment between the constitutional court and the rest of the court

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<sup>235</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>236</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>237</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>238</sup> See GINSBURG, *supra* note 234. More generally, see Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225, 230 (Tom Ginsburg & Robert A. Kagan eds., 2005).

<sup>239</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>240</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>241</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>242</sup> See, e.g., GINSBURG, *supra* note 234; SWEET, *supra* note 227.

<sup>243</sup> See generally Alec Stone Sweet, *Constitutions and Judicial Power*, in COMPARATIVE POLITICS 218 (D. Caramani ed., 2008) (discussing the standard trade-offs).

<sup>244</sup> See, e.g., Nicolas Marie Kublicki, *An Overview of the French Legal System from An American Perspective*, 12 B.U. INT'L L.J. 58 (1994) (arguing that the French experience demonstrates the sporadic and slowness of American constitutional review



system, and the potential capture by special interests (in particular, the political actors).

Originally, the Kelsenian model was not defended in a cost-benefit framework. It is easy to see, however, that under the legal tradition of the civil law and the specific nature of a career judiciary, a cost-benefit argument can be made that the benefits enhanced by the Kelsenian model offset the potential costs of capture. In fact, current empirical results seem to show that the Kelsenian model is more adequate for growth.<sup>245</sup> Apparently, the benefits of specialization offered by the Kelsenian model certainly more than justify the costs.<sup>246</sup>

## V. CONCLUSION

This article aims to accomplish two goals. On one hand, we provide a methodological criticism of the current literature on legal origins. We argue that a theoretical baseline for the efficiency of the common law vis-à-vis French law must necessarily be micro-oriented, and we provide important examples (for market efficiency and for economic growth) where French law seems to be plausibly better or more adequate. It must be emphasized that the purpose of our thesis is not to propose the opposite of the efficiency of the common law literature—that is, French law as the benchmark for market efficiency. Our thesis is that without a detailed analysis of common law and French law institutions, it is not possible to theorize the legal origins literature. However, when such detailed analysis is performed, it is not obvious which legal system has more pro-market or pro-economic growth legal institutions. The persistence of the alleged superiority of the common law requires a proper theorization that will be complex and intrinsically difficult.

Our second goal is to explain why the syndrome of the efficiency of the common law is based on the implicit assumption that one size fits all. We have discussed in detail the institutional arrangements of administrative, commercial, and constitutional courts and developed a framework that identifies the relevant costs and benefits of different options. In all three cases, we provided an argument for why the design in France could be appropriate, and yet why the different design in common law countries could be similarly appropriate at the same time for those countries. Different designs do not indicate that one is correct and the other is incor-

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even if French constitutional review lacks the capacity to implement social and economic policy).

<sup>245</sup> See Lars P. Feld & Stefan Voigt, *Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* (Roger D. Congleton & Birgitta Swedenborg eds., 2006).

<sup>246</sup> See *id.* 251, 276-77 (finding that constitutional review powers vested in the highest judicial instance (the American model) reduce economic growth).

rect. It might simply indicate that the balance of costs and benefits is structurally different.

This conclusion is very important from the viewpoint of legal reform and legal transplanting, particular in the context of the *Doing Business* project. The identification of legal and institutional impediments to economic growth cannot be exclusively based on a benchmark exercise where common law legal institutions serve as a role model. We emphasize once more that such exercise is relevant and provides useful information that should be an important input in the design of legal reforms. However, legal institutions are more complex, and mere analogies with legal institutions elsewhere cannot be the rigorous basis for reform. In fact, as we have discussed with our examples, policies based on such methodology can be counter-productive and may replace current institutions with more problematic and less pro-economic growth transplanted institutions. The design of a legal system must conform to local conditions and determinants that have first to be identified. Only such careful analyses can accurately assess the advantages and disadvantages of replacing certain institutional arrangements with others.

**Table 1: Costs and Benefits of Specialized Courts**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Higher quality of decisions (in content and in timing)</li> <li>• Legal coherence</li> <li>• Uniformity of judicial decisions</li> <li>• Reduction of regular courts' workload</li> </ul>	<ul style="list-style-type: none"> <li>• Administrative costs of running a new network of courts</li> <li>• Capture by specialized interests (including a specialized bar)</li> <li>• Costs of coordination with regular courts (include losses to incoherence between different areas of the law and procedure)</li> <li>• Development of vested interests by specialized judges and court services or the creation of new state agencies</li> <li>• Costs of appeal from specialized courts to nonspecialized appeal courts (depending on the locus of specialization)</li> <li>• Costs of less geographical proximity of courts to populations (since specialized courts are usually located in large cities)</li> </ul>

Source: Nuno Garoupa, Natalia Jorgensen & Pablo Vazquez, *Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain*, 24 INT'L J.L. POL'Y & FAM. 54, 55 (2010).

