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# Uncertainty of Law and the Legal Process

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## The idea

**“The uncertainty of legal proceedings is a notion so generally accepted [...] that he who should attempt to refute it would be looked upon as a man, who was [...] incapable of discernment [...].**

**[It] must be imputed to the defects of human laws in general, and [is] not owing to any particular ill construction of the [legal] system.”**

*Blackstone's Commentaries of the laws of England (1765-1769)*

## Scope of the analysis

**We do not examine the efficiency of legal rules**  
**We focus on the efficiency of the process of rulemaking**

*Producing **efficient** rules*

**VS.**

*Producing rules **efficiently***

# The idea

**Uncertainty of law generates litigation, which in turns makes the law more certain**

**We study the interaction of legislation and litigation**

# The literature

**Pistor and Xu (2003): the law is**

- complete when all relevant applications of the law are unambiguously stipulated.**
- incomplete when it contains gaps or its boundaries are not clear.**

## The literature

**Kaplow (1997): legal systems have to find an equilibrium between over-detailed laws and ambiguous terms.**

**Landes and Posner (1976), Posner (1992): body of precedent can be analogized to a capital stock that depreciates over time**

## The literature

- **Rules v. standards (Ehrlich and Posner, 1974)**
- **Incomplete law (Pistor and Xu, 2003)**
- **Complexity of law (White, 1992)**
- **Efficiency of the common law (Posner, 2003, Rubin, 1977, Priest, 1977, Goodman, 1978)**
- **Law and finance (La Porta et al., 1998)**
- **Litigation (Bebchuck, 1984)**

# Our point

**Uncertainty of law fosters litigation**

**Parties litigate if their expectations over the  
outcome of the adjudication diverge.**

**Uncertainty increases the chances that this  
happens**

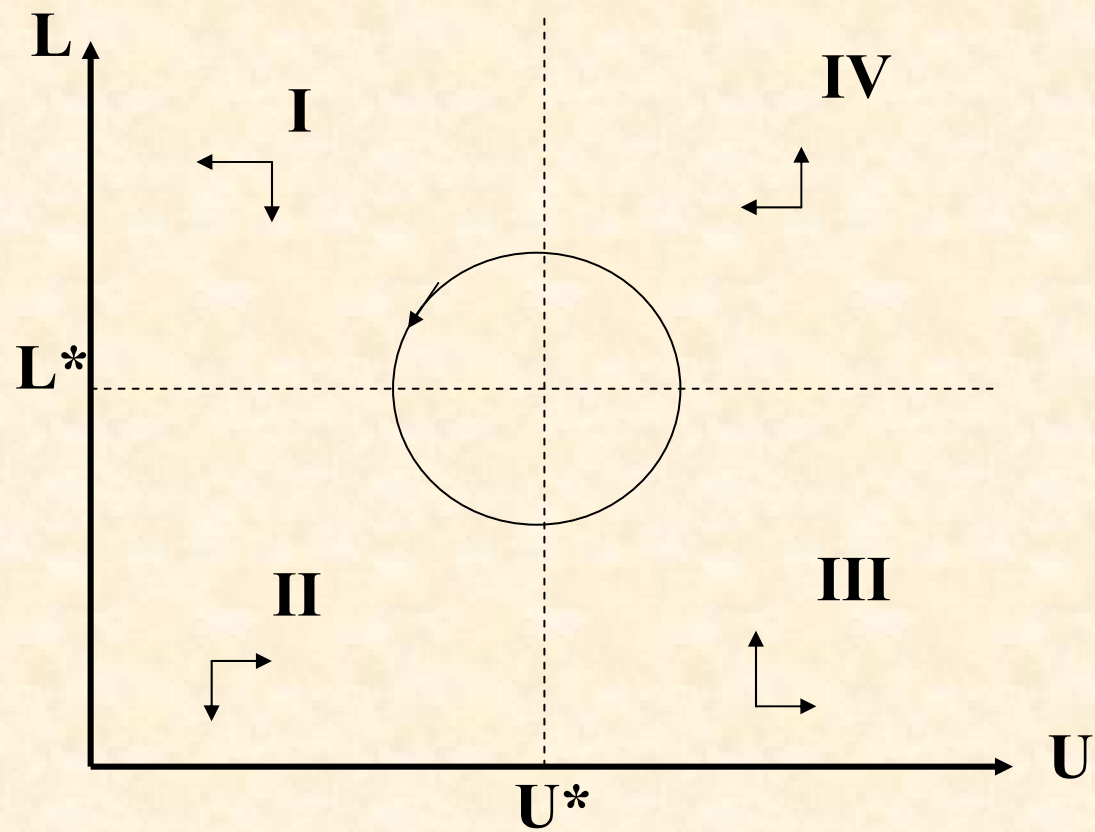
# Our point

**Litigation reduces uncertainty**

**Judicial adjudication creates precedents and hence fills the gaps in the law and reduces future litigation on the same issue**

**Litigation sustains a certain degree of certainty, which otherwise decays over time**

# A dynamic hypothesis



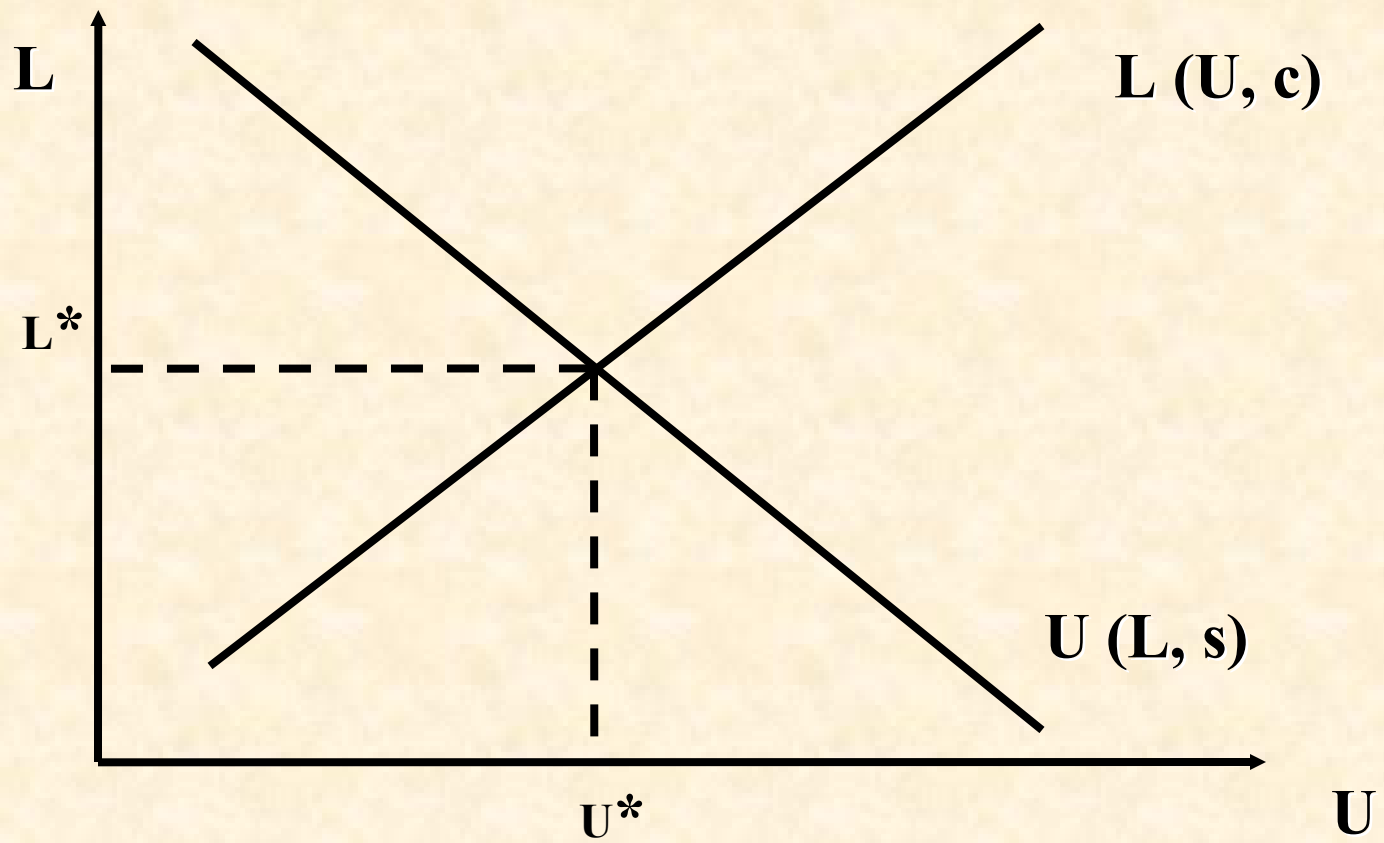
# A “demand-supply” interaction

$$L = L(U, c)$$

$$U = U(L, s)$$

**With  $L_U > 0$ ,  $U_L < 0$**

# The model



# Policies

**Legislation**

**v.**

**Litigation-cost policy**

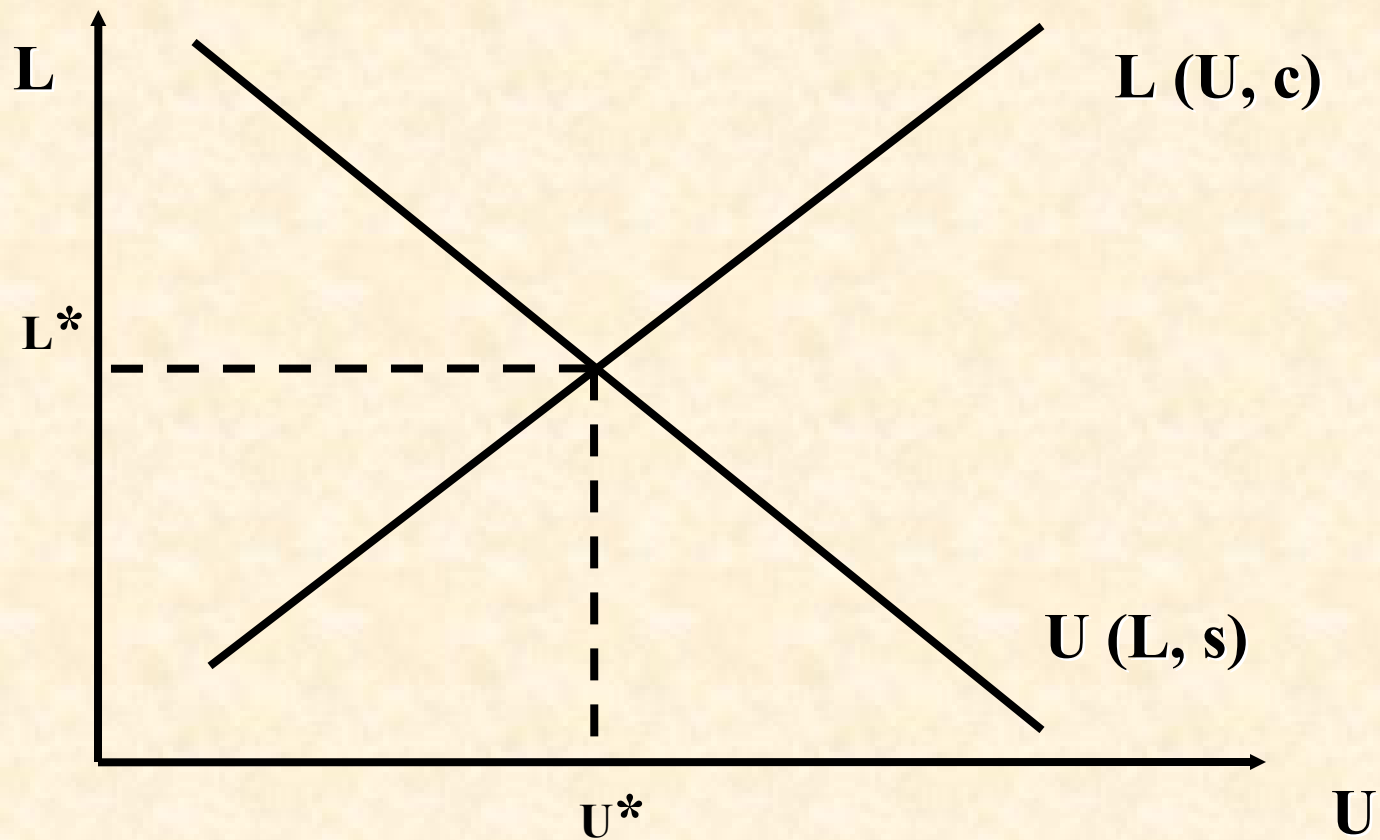
$$\mathbf{L_c < 0, U_s < 0}$$

# Policies

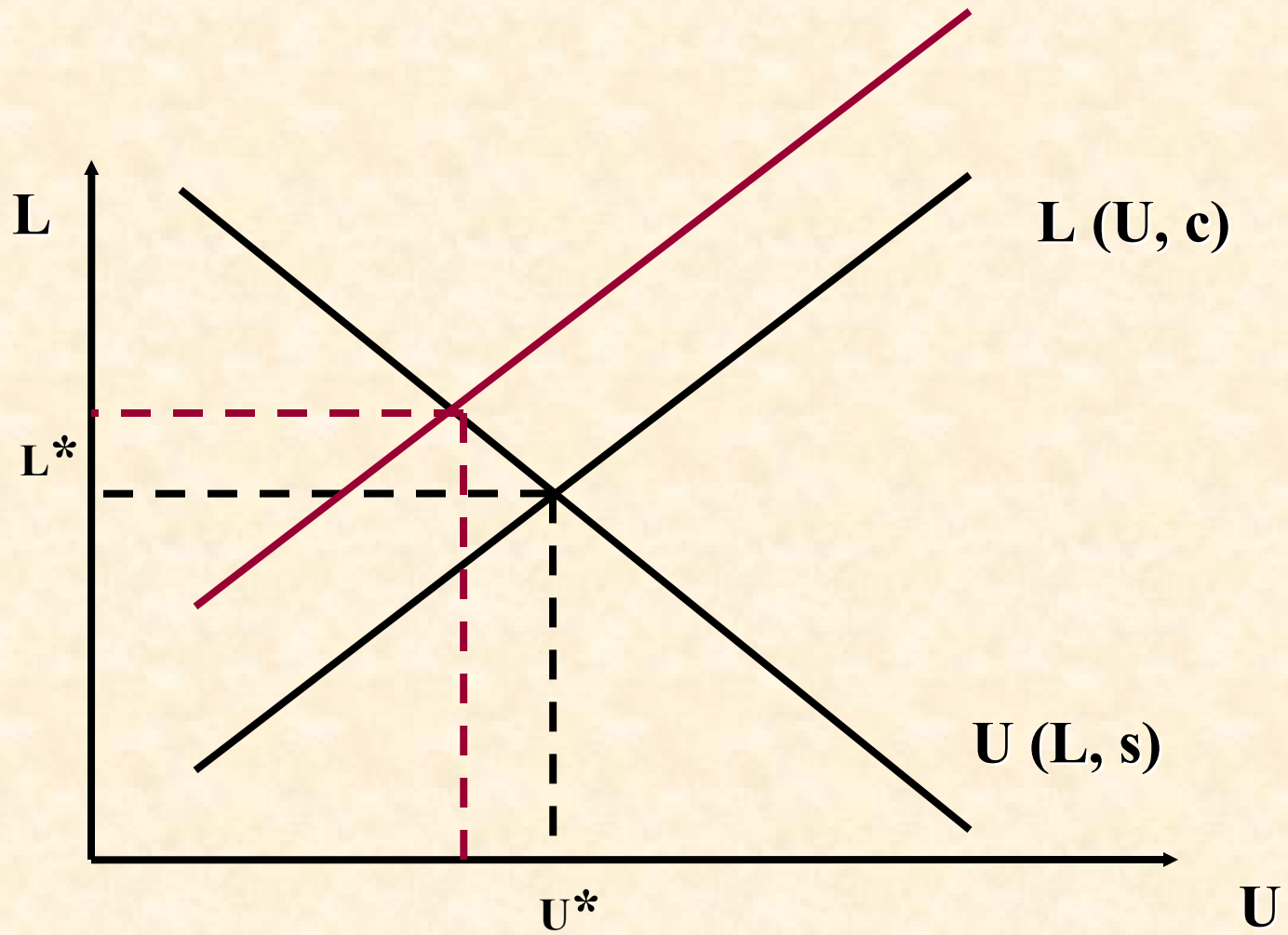
**Legislation = centralized supply of certainty**

**Judicial process = decentralized way of  
producing legal rules**

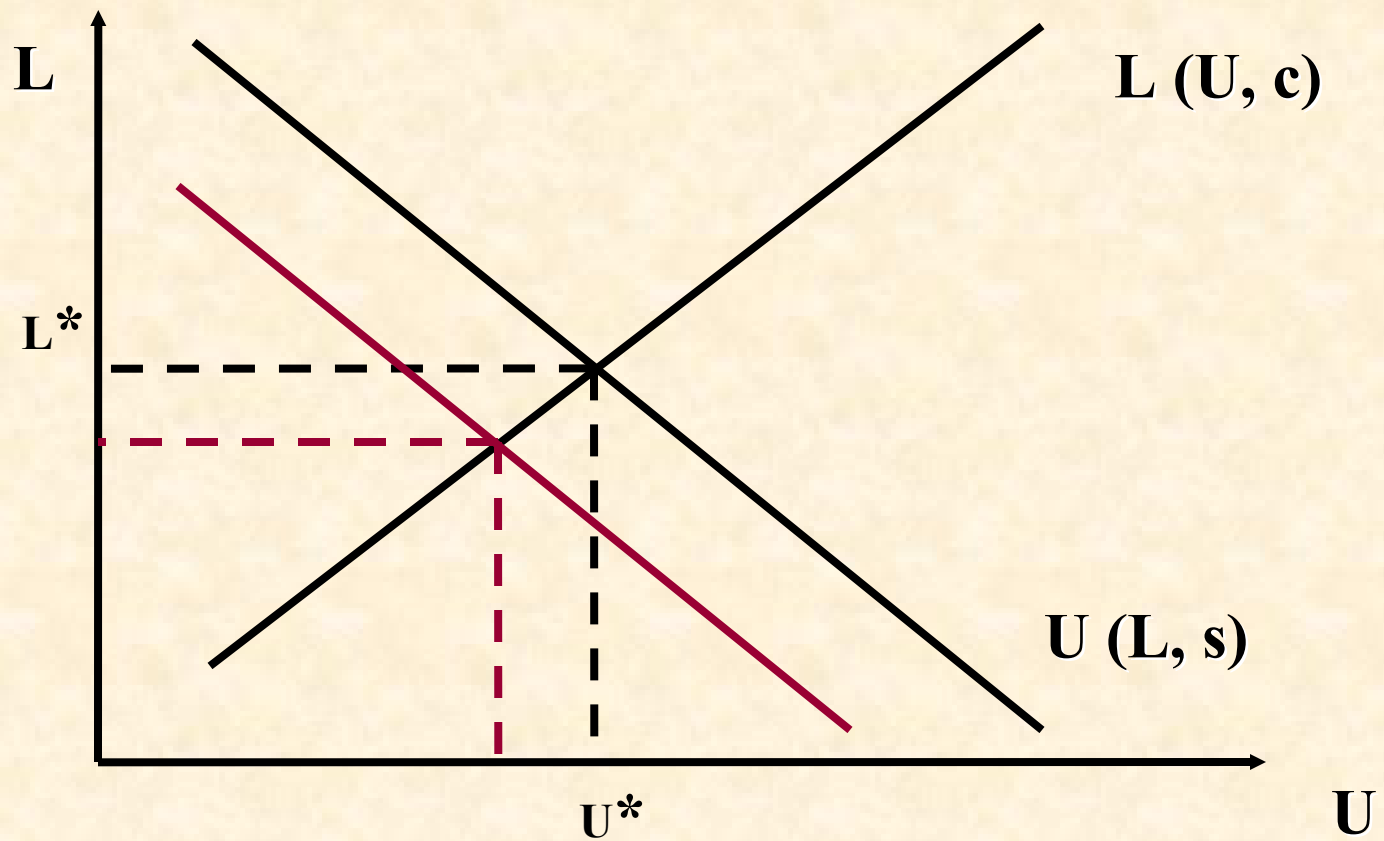
# Private “supply” and “demand” for certainty



# Effect of policies: $c \downarrow$



# Effect of policies: $s \uparrow$



# Social optimum

$$\min_{c,s} [C(L(c,s)) + D(U(c,s)) + s]$$

# Relevance

- **Assess effects of state intervention on litigation (tort) reforms and legislation**
- **Compare civil law and common law countries**
- **Redefine the role of institutions in the production of law**
- **Determine the costs of lawmaking**

# Conclusions

**Looking at the legal system as an uncertain set of rules in constant evolution**

**NEXT: effects of other institutions on the dynamics of uncertainty and litigation**

**NEXT: dynamic analysis**