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FOREWORD

ECONOMISTS ON THE BENCH*

We have taken an oath to do justice to rich and poor alike. . . .[1]

George Stigler once said that an economist was someone who was willing to spend fifteen (now fifty) dollars to join the American Economic Association. Certainly, the present notion of who is an economically sophisticated judge or an economically sophisticated law professor is equally Chicagoan and self-identifying. The reason for this conference volume is that this self-identifying group has become large and its growth and influence in the legal scholarship and judicial arenas is increasing. Should federal and state judges be required to spend a semester at Chicago or Harvard to study economics? What kinds of economics should they study? These are questions which are only partially answered by this volume of *Law and Contemporary Problems,* but they are questions which we will have to answer in upcoming decades.

The participants in this conference are divided on only one of two very different questions which can be posed about how to use economics in judicial decisionmaking. Conference participants all agree that economics is important in understanding legal questions, as Figure 1 illustrates. There is a fundamental disagreement, however, on how much economic thinking will

* David Berger provided invaluable assistance in setting up this conference. In addition, I would like to thank Dean Paul Carrington, General Editor Joyce Rutledge, the staff of *Law and Contemporary Problems,* and Sandi Perkins for their efforts to make this conference and volume of *Law and Contemporary Problems* a success. Finally, my colleagues, George Christie, Tom Metzloff, Michael Meurer, and Paul Haagen, expertly and graciously acted as moderators of the conference sessions, and William Darity, Judge Patrick Higginbotham, Daniel Graham, Richard Schmalbeck, and Christopher Schroeder contributed immeasurably to the success of this issue through their participation in the conference proceedings.

1. American Hosp. Supply Corp. v. Hospital Prod., Ltd., 780 F.2d 589, 598 (7th Cir. 1985) (Posner, J.).

alter the results produced by the legal process.[2] Almost all of the participants have written about or taught law with a great deal of economic sophistication. In addition, the conference is blessed with several, now not so rare, members of the federal judiciary who are comfortable speaking, writing, and thinking in the modern language of economists, and has a fair representation of professors who are professionally trained economists who teach at accredited law schools. If we were to place the participants in this conference on a diagram of how they each feel about the importance of economic analysis in law in general, it is clear that almost all of the participants would be located fairly close to the pole that represents a very strong belief that economic analysis has something important to add to legal discourse.

The general agreement among conference participants that economics is important in being a literate judge in the 1980's does not lead to a consensus regarding the importance of economics in determining judicial results. It is also possible to graph the views of conference participants on this second question.[3] At the right pole in Figure 2 are those participants at this conference who believe that economics explains all of the legal decisions that can be made and at the other pole are those who, while believing that the language and discipline of economic thought is important, do not believe that using economic analysis would change any result that a judge would otherwise reach. It is easy to illustrate the difference between these two questions and the answers that those who write and think in economic terms would give. Judges and jurors are often asked how to value human life lost as the result of negligence. All of the conference participants would, I believe, think that modern economic theory can contribute to understanding how to think about the questions involved in putting a legal value on life or, perhaps more accurately, putting a value on how much the survivors should be compensated for the loss. Economics is important in measuring the market value of these deaths and in measuring the impact on the survivors of the loss. The common law is appropriately congenial to permitting evidence of this type to enter the judicial process, and no judge would toss such information out as irrelevant. Similarly, all of the participants would believe that such information would be helpful; that is to say, economics is important to the first question. There is a second question—how to use the information that the economists bring to the question of how to value life. At this point, the general agreement would

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2. There is even some disagreement among the strong adherents of economics in the law and economics movement about the role of economic thinking in judicial decisionmaking. Posner and others have argued that economics matters but they also contend that economic results can be produced by noneconomic thinking. *See* R. POSNER, ECONOMIC ANALYSIS OF THE LAW 232 (3d ed. 1986). Posner himself seems to have retreated from the strongest version of this perspective. *Id.* at 527-28. *See also* Culp, *Judex Economicus*, LAW & CONTEMP. PROBS., Autumn 1987, at 111-14, 124-29 (arguing that some of Posner's implicit judicial assumptions would make economic thinking irrelevant in the long run).

3. Many have confused these two very distinct issues. For example, confusion on this issue is at the heart of the dispute between Tribe and Easterbrook over the appropriate role of economics in constitutional adjudication. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985); Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985).

THE IMPORTANCE OF ECONOMICS IN BEING A LITERATE JUDGE

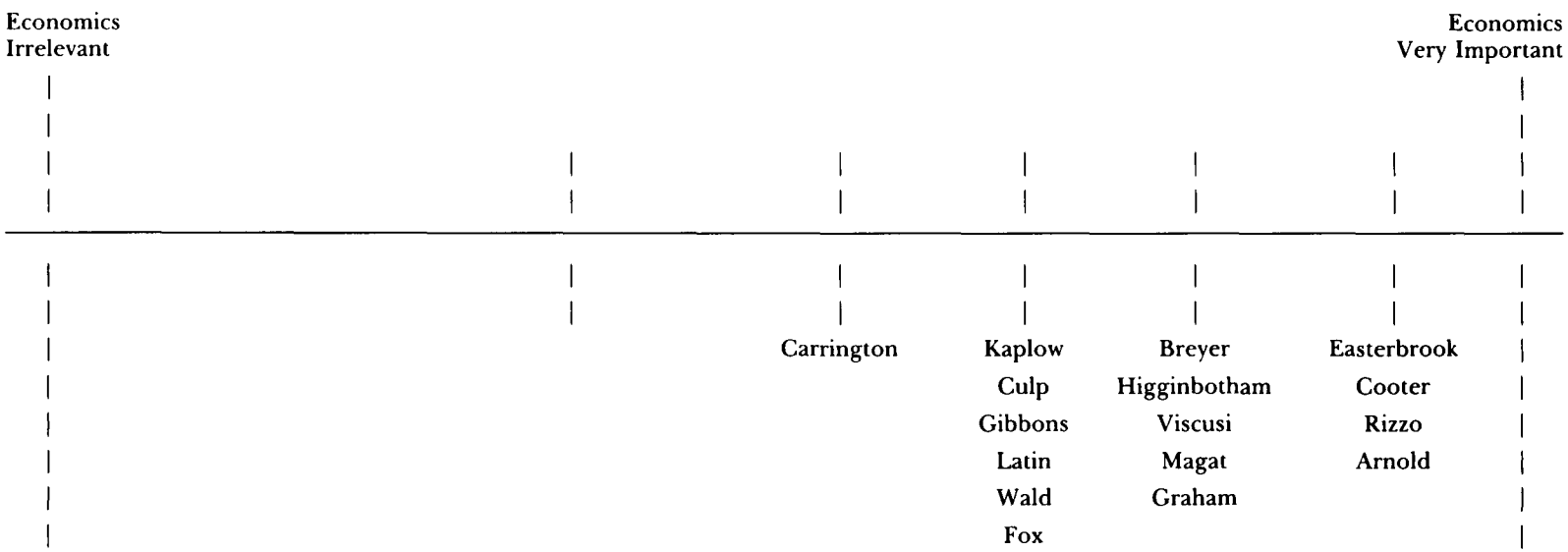

FIGURE 1

evaporate. Some would argue that economics is the only determinant and accordingly that the economic measurement should equal the legal measurement.[4] Others would point out that no matter what a judge would like to do, all she has before her are the market values and that these values will have a strong impact on the compensation chosen. Most would argue that the question of how to value life ought to be considered in broader terms and other issues ought to be included in the determination, that is to say, the legal answer may be different from the economic answer.[5] It is this difference in how to weigh economics (prospectively) in the legal arena that will be part of the discussion among judges and legislatures in the future.

The participants at this conference hold a wide variety of views on this latter question as you can see from Figure 2. None of the participants believe that economics should explain all or even most legal questions.[6] Some, particularly the professional economists, would give economics a much wider power to alter and change results that judges and the legal process produce. This strong view of economics is neither the only nor, necessarily, the dominant view. It is unlikely that even though a substantial number of federal judges have been exposed to economic thought, at places like Henry Manne's law and economics center and conferences like this, that a majority of those judges would subscribe to the strong view of economic analysis in judicial decisionmaking. At the moment, this view of economic analysis seems most prevalent among the scholar-jurists that have been appointed to a few federal benches, but as I indicate in my article, and as Judge Gibbons indicates in his comment, there have been movements on the part of other judges toward responding in the language of economics. When they use the constraints and assumptions given by economic analysis, these judges alter the way in which lawyers argue cases to the court and how lawyers, law professors, and students prepare for legal work.[7]

It may seem premature to evaluate the work of these economically sophisticated judges before the main body of their judicial contributions have been completed. Certainly, the evaluations of great common law judges have been done primarily from the perspective of history, by legal historians, for

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4. *See* R. POSNER, *supra* note 2, at 182-85 (Posner concludes that the economic measurement ought to be the legal answer and accordingly ought to be very high.). W. VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE (1983) (describing the economic answer and implicitly arguing that this ought to be the legal answer).

5. It might be more precise to say that the legal answer is determined by different factors, since it is possible, if unlikely, for the different processes that go into the legal and the economic answers to lead to the same result.

6. There are three reasons why economics does not explain all legal results. (1) Economic thinking may lead to the same rule as other modes of analysis. (2) Economics may have nothing to say about the legal question asked. (3) What economic thinking has to say is unclear. Judges have to decide first whether economic thinking leads to different results and then decide whether the results are important to resolving the legal issue.

7. For a discussion of the role of economics in legal thinking, see Ackerman, *Law, Economics, and the Problem of Legal Culture,* 1986 DUKE L.J. 929; B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 23-39, 88-106, 168-89 (1977).

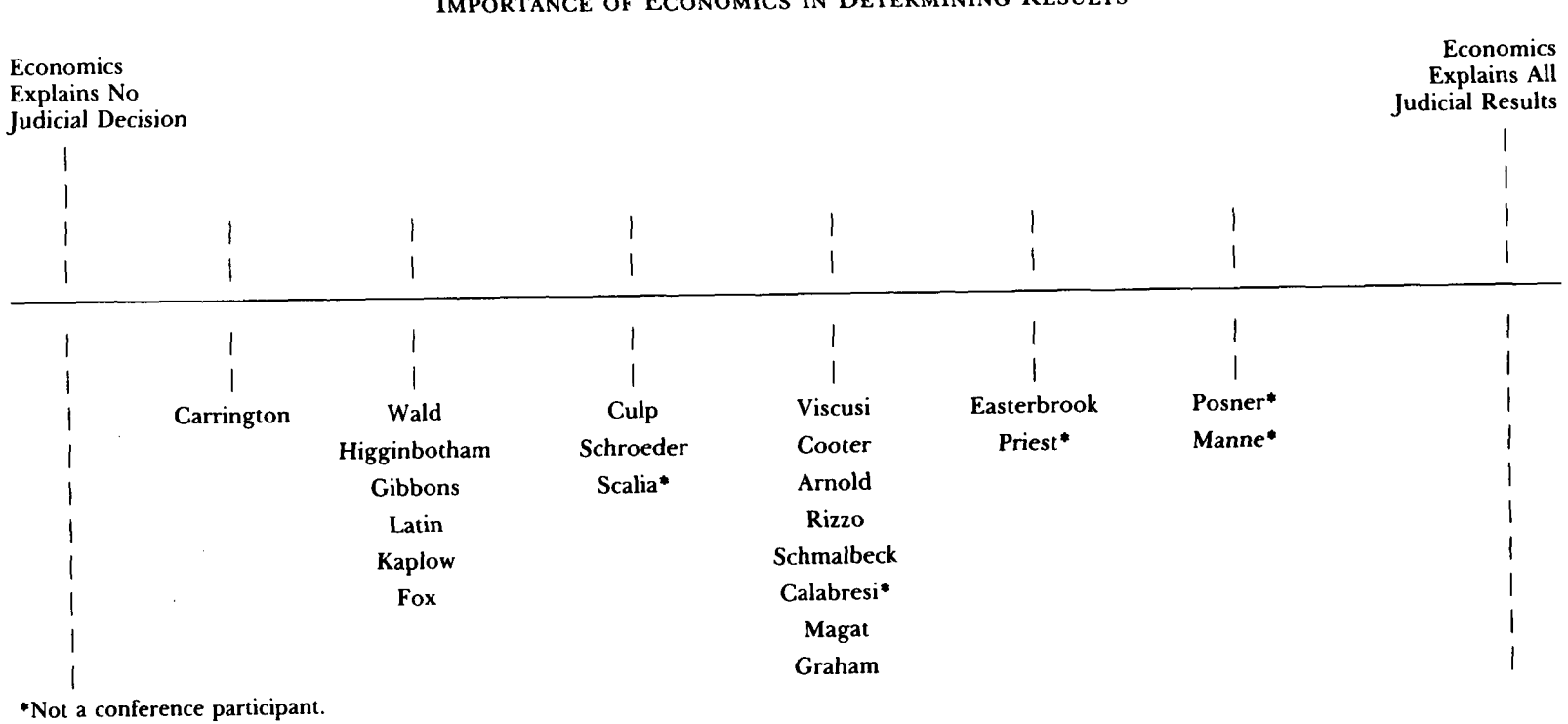
IMPORTANCE OF ECONOMICS IN DETERMINING RESULTS
Economics Explains No Judicial Decision
Economics Explains All Judicial Results
Carrington
Wald
Higginbotham
Gibbons
Latin
Kaplow
Fox
Culp
Schroeder
Scalia*
Viscusi
Cooter
Arnold
Rizzo
Schmalbeck
Calabresi*
Magat
Graham
Easterbrook
Priest*
Posner*
Manne*
*Not a conference participant.

FIGURE 2

legal historians.[8] Most of these economically sophisticated judges have been appointed within the last ten years, and we only have the benefit of a very limited amount of what will be potentially long judicial careers. Like Holmes and Story, who, as appellate judges, were the closest analogues to these appointments of economically sophisticated judges, these scholar-jurists have been active participants in both the workings of the court and in continuing their scholarly careers. Even now, for example, Judge Posner's activities include influential texts on how the judicial process ought to work,[9] and enough serious legal articles to gladden the heart of any law school professor. The participation in this conference by a large number of federal judges demonstrates that there is a real interest among judges to use economics in decisionmaking. In addition, it seems likely that other adherents of this judicial perspective will be appointed to the courts of appeal and the Supreme Court by future Presidents of both parties. Given this background, it is more appropriate to begin the evaluation of the impact of economic analysis on the judicial process.[10] The articles evaluating the use of economics in the scholarship of Judge Posner, and now Justice Scalia, and the note on Judge Easterbrook begin the evaluation of the contribution of economics to the

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8. *See, e.g.*, G. WHITE, THE AMERICAN JUDICIAL TRADITION (1978) (examining the judicial opinions of the great American judges from John Marshall to Earl Warren); M. SCHICK, LEARNED HAND'S COURT (1970) (examining the Second Circuit during the tenure of Judge Hand). *See also* Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 982 (1977) (Tushnet argues that Holmes found that his attempt to use policy to articulate his judicial views was met with hostility by his judicial colleagues and that over time Holmes reduced the use of policy to articulate his views. In addition, Tushnet argues that Holmes eventually became convinced that policy and judicial law-making were not important parts of the law.). Whether Posner will be able to articulate economic policy without creating similar concerns on the part of his Seventh Circuit colleagues is unclear. For a further discussion of this issue, see Culp, *Judex Economicus*, *supra* note 2, at 119-20, 130-32, 136-38.

9. R. POSNER, THE FEDERAL COURTS (1985). In this text, Posner brings together much of the extensive work that he has done on the courts in numerous law reviews and extends that scholarship with a touch of judicial experience. *See* Redish, *Book Review*, 85 COLUM. L. REV. 1378 (1985) (Posner's analysis adds much to the current debate about improvement in the operation of the federal courts and about the proper scope of judicial restraint, but Posner's failure to engage in a serious analysis of specific legal doctrine renders his study of only limited value.); Monaghan, *Book Review*, 99 HARV. L. REV. 344 (1985) (Posner captures the impact of institutional change on the courts and the judges themselves, and contributes to those efforts rethinking the nature and theory of appellate judging, but his proposals for reform are unlikely to halt the litigation crisis and proceed from a limited view of federal jurisdiction.); Bator, *Book Review*, 52 U. CHI. L. REV. 1146 (1985) (Judge Posner's account of the federal courts provides powerful evidence for the need for change in how judges view their tasks.).

10. R. POSNER, *supra* note 2, at 491-519; R. POSNER, *supra* note 9. The best discussion of the use of economics by the courts is in Easterbrook, *The Supreme Court, 1985 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 1 (1984). *See also* Tribe, *supra* note 3; Easterbrook, *supra* note 3. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); R. POSNER, *supra* note 2, at 15-17 (Posner argues that economics is a powerful tool for the courts.); Brenner, *Imperialist Science*, 9 J. LEGAL STUD. 179 (1980) (economics is expanding into legal areas because of the power of the economic paradigm); Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 981-1001 (1978) (sales cases conform to economic principles). For critiques of the use of economics in the judicial process, see Kelman, *Taking Takings Seriously: An Essay of Centrists*, 74 CALIF. L. REV. 1829 (1986); Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811, 848-72 (1980). *See also* Gibbons, *Antitrust, Law & Economics, and Politics*, LAW & CONTEMP. PROBS., Autumn 1987, at 217.

decisions of the most economically sophisticated of the recent appointments to the federal bench. In addition, the article by Professor Fox examines the impact of an economist, James Miller, as a regulator in his role as Chairman of the Federal Trade Commission.

Professor Viscusi argues cogently that economics was effectively used by then Judge Scalia in reviewing the bumper standard promulgated by the National Highway Traffic Safety Administration (NHTSA).[11] Viscusi concludes that, in at least this case, the use of economics will lead to more "rational" judicial policy by giving the appellate courts more with which to evaluate the actions of administrators.[12] Viscusi notes, however, that this task may increase the burden on federal judges by requiring them to engage in an analysis with which they are unfamiliar, but he believes that there will be a net advantage to the process of judicial decisionmaking. Viscusi also makes the point that the use of economics requires judges to engage in a more extensive investigation of economic factors and assumptions about how various factors influence economic actors. Using economic analysis will, if adopted widely, lead courts to change the nature of the evidence that they deem important, and it may mean that courts should alter the rules of evidence and procedure.[13] This is also supported by Justice Scalia's recent concurrence in the Supreme Court's reversal of a Posner-authored opinion.[14] Professor Eleanor Fox asks similar questions about the role of economics in changing the character and the style of the debate engaged in by the Federal Trade Commission under James Miller.[15] She argues that Chairman Miller, the first nonlawyer economist to serve as chairman, changed the scope and quality of the economic arguments made at the Federal Trade Commission, but that the most important factor in how Chairman Miller and his liberal Democratic predecessor, Michael Pertschuck, came to their conclusion was politics, not the quality of the economic arguments used by either.[16] Professor Fox suggests that this explodes the notion of economics as a neutral principle in this kind of legal decisionmaking. She suggests that while economics matters, politics matters more in determining legal results.[17]

My colleague, Richard Maxwell, in discussing the title of this conference, put the weak view of economics most succinctly. He noted that after much study and hard work on his oil and gas casebook[18] with his co-author, Steve

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11. Viscusi, *Regulatory Economics in the Courts: An Analysis of Judge Scalia's NHTSA Bumper Decision*, LAW & CONTEMP. PROBS., Autumn, 1987, at 17.

12. *Id.* at 30-31.

13. *See* Gibbons, *supra* note 10 (arguing that the Supreme Court has tried to alter the procedural rights in one aspect of antitrust in order to reach a particular objective).

14. "I do not share the Court's apparent high estimation of the beneficence of the state statute at issue here. But a law can be both economic folly and constitutional." CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1653 (1987) (Scalia, J., concurring).

15. Fox, *Chairman Miller, The Federal Trade Commission, Economics, and* Rashomon, LAW & CONTEMP. PROBS., Autumn 1987, at 33.

16. *Id.* at 34-40.

17. *Id.* at 41, 45, 49, 54-55.

18. R. MAXWELL & S. WILLIAMS, CASES AND MATERIALS ON THE LAW OF OIL AND GAS (5th ed. 1987).

Williams, who is economically sophisticated[19] and—perhaps not coincidentally—now a federal judge, he had concluded that economics had not changed any of his basic assumptions or the conclusions about oil or gas law nor should it. Professor Maxwell concludes that economics does not alter much of his own analysis because economics is a product of common sense and some of the economic analysis is not verifiable. Accordingly, economic thinking has pervaded legal scholarship directly and indirectly in areas as diverse as constitutional law and antitrust.[20]

In addition to Professor Fox, several other participants in this conference contend that economics helps to explain principles reached through other means. Professor Latin uses Judge Stephen G. Breyer's 1984-1985 opinions as an informal "data base" to examine litigation on the ability of economic analysis to determine the results in federal appellate cases.[21] Judge Breyer has argued in decisions and scholarly writing that the need for administrable, predictable, and fair legal rules often precludes judicial attempts to reach efficient results in individual cases.[22] Latin agrees with this view and supports it by identifying six types of decisional factors that may often be outcome determinative: allocation of institutional responsibilities, justiciability constraints, unquantifiable or incommensurable interests, fairness and evenhanded justice, global efficiency effects, and microefficiency effects. Latin examines a number of Judge Breyer's opinions to support the conclusion that microefficiency effects, the basis for most "law and economics" analyses, can seldom prove decisive in appellate decisions. The second part of Latin's article provides more detailed analyses of torts decisions on res ipsa loquitur and "pure" economic damages. Latin contends that Judge Breyer should have placed greater emphasis on economic analysis and efficiency considerations in resolution of these disputes. Nevertheless, Latin concludes that economics cannot do what the strong view adherents claim and that judges should not be persuaded into believing that such power resides in economic anaysis.

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19. *See, e.g.*, Williams, *Free Trade in Water Resources:* Sporhase v. Nebraska ex rel. Douglas, 2 SUP. CT. ECON. REV. 89 (1983); *Solar Access and Property Rights: A Maverick Analysis*, 11 CONN. L. REV. 430 (1979); Book Review, 25 UCLA L. REV. 1187 (1978).

20. Much of modern constitutional analysis is done from the perspective of balancing, which borrows from economic principles. *See, e.g.*, Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (Arguing for a constructive coherence theory of constitutional interpretation which takes account of the various modes of analysis, Fallon does not build an economic model of interpretation, but his model has learned from the economism of our age.); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (Describing the prevalence of balancing and the inherent problems associated with its unexpected triumph. Aleinikoff also does not acknowledge directly the economism associated with this approach.); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 915 (1978) (arguing for a balancing approach to the first amendment). *But see* Tribe, *supra* note 3 (criticizing balancing approach in general).

21. Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, LAW & CONTEMP. PROBS. Autumn 1987, at 57.

22. *See* Breyer, *Economics and Judging: An Afterword on Cooter and Wald*, LAW & CONTEMP. PROBS., Autumn 1987, at 245-46.

Professor Magat believes that Latin and Breyer underestimate the importance of economic thinking in judicial decisionmaking.[23] Magat argues that it is possible to distinguish between the goal of judging and the usefulness of economics in helping judges think about legal problems.[24] Magat suggests several cases where he concludes economic thinking was either useful or mandatory to the appropriate legal result being reached by Judge Breyer.[25] In addition, Magat notes that economics seems more important to the results of Judge Breyer's judicial opinions than either he or Latin concedes.[26] The conflict between these views is primarily a dispute over the two questions that I have noted above and about which the participants in this conference differ. Magat contends that even if one is not convinced that economic efficiency or wealth maximization ought to determine judicial results that economics has a role to play. Magat believes in a strong view of economics in legal thinking. Professor Latin and Judge Breyer might attribute some of what Magat concludes is economic perspective to simple common sense, but they are also differing about the manner in which economics can contribute to the judicial process.

Those in the law and economics movement who take the strong view take a vastly different approach. These law and economics writers argue that judges ought to speak in economic terms precisely because the use of economics will lead to different and better results. For its most ardent adherents, economics is the neutral principle which can be the basis of producing appropriately nonpolitical legal results.[27] Judge Easterbrook, in a recent *Foreword* to the *Harvard Law Review*,[28] best expressed this strong view of economic analysis. Professor Easterbrook argued that judges spend too much of their time attempting to deal with individual justice (what Easterbrook and others have called ex post concerns) and too little time dealing with universal justice concerns (what Easterbrook denotes as ex ante issues). Easterbrook also argues that judges, in dealing with economic concerns, ignore the marginal effects of legal rules and tend to focus on the average effect. In addition, Easterbrook argues that judges should distinguish between those statutes which are primarily for private gain and those for public interests. Those statutes and regulations which are intended to be for private gain should, according to Easterbrook, be construed narrowly by judges. While Professor Easterbrook makes it clear that economically sophisticated judges can and will

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23. Magat, *Howard Latin's Analysis of the Legal and Economic Considerations in the Decisions of Judge Breyer*, LAW & CONTEMP. PROBS., Autumn 1987, at 87.

24. *Id.* at 88.

25. *Id.* at 90-93.

26. *Id.* at 87-88.

27. *See* R. POSNER, *supra* note 9, at 199-215 (federal courts should adhere to principled decision-making which can use economic factors to be principled and can give meaning to Wechsler's neutral principle). *See also* McConnell, *The Counter-Revolution in Legal Thought*, 41 POL'Y REV. 18, 23-25 (stating that law and economics provides a neutral principle for judging). *But see* Easterbrook, *supra* note 10 (contending that he and the law and economics movement have more modest claims for the use of economics in judging).

28. Easterbrook, *supra* note 10.

differ as to what is the appropriate legal rule, he argues that economic sophistication is a positive goal.

Judge Easterbrook contends that economic theory is a helpful way to think about legal questions. The time of judges, lawyers, and law clerks is too limited to permit judges or other participants in the legal system to examine the many possibly appropriate political or social science theories. In order to know whether judges use too much or too little economic theory in judicial decisionmaking, judges must decide what the goals of their decisionmaking are. If those goals are broader than simply maximizing economic efficiency or wealth maximization, then the Easterbrook prescription is not helpful enough to judges because it does not provide a blueprint for knowing when to use economics. For example, unlike the market system, where it is plausible to argue that we should ignore questions of individual equity in determining appropriate policy, the courts have not decided that they can divorce equitable and efficiency concerns completely. If judges adopt economic efficiency as their primary goal, there are still significant problems with the Easterbrook approach. An examination of two examples from his article will illustrate these difficulties.

In maintaining that judges should use marginal analysis, Easterbrook argues that the important question in such analysis is not the size of the marginal effect, but the direction of this effect.[29] This argument makes several unreasonable assumptions about the judicial process and economic theory. Economic questions are not primarily theoretical. The economically sophisticated judge not only must worry about measuring the size of marginal effects, but he also must worry about the administrative costs associated with examining certain policies. If a judge can determine that the effect of a questioned legal policy (whatever the direction) is small enough at a cheaper cost than it would be for him to determine the direction and exact size of an effect, then it is appropriate for the judge simply to view, with respect to judicial concerns, the effect as nonexistent. If judges are worried about the welfare effect of a policy, the direction of the effect is not important, but the welfare gains and losses (including the cost of judicial administration) imposed by such a policy are important.

In commenting on *Bacchus Imports, Ltd. v. Dias*,[30] Easterbrook argues that Hawaii's exemption of its tiny Hawaiian fruit wine and okolehao (a specialty drink) from a twenty percent tax on the sale of liquor in Hawaii will by definition have the effect of requiring out-of-state producers and importers rather than consumers in Hawaii to pay part of the tax imposed.[31] The issue before the court in *Bacchus Imports* was a simple procedural question: Did the exemption of tax liability for Hawaiian domestic liquor producers violate the Commerce Clause and require the Hawaiian courts to permit defendant importers to attempt to prove that the exemption impermissibly shifted the

29. *Id.* at 33-38.
30. 468 U.S. 263 (1984).
31. Easterbrook, *supra* note 10, at 4.

tax burden to them? Since this is a procedural question, the issue before the court is not primarily whether the tax will have a small negative (or positive) effect on out-of-state producers. The real question for the court is whether it is worth the judicial resources to examine the issue.[32] In those circumstances, the dissent could be right that the sale of local liquor, which increased from .0022 to .00774, is too small to require the Hawaiian courts to spend large amounts of judicial resources deciding whether the effect (known to be insignificant) is likely to create a significant negative effect on liquor demand for out-of-state liquors.[33]

Of course there is a second order question of whether permitting this kind of activity will encourage states and localities to pass legislation which in the aggregate will substantially reduce interstate commerce. This is only important if we can be certain (as is Easterbrook) that the effect is likely to be harmful to interstate commerce. In a world in which there are numerous competitive distortions, in a world of the second best,[34] it is possible that such actions can increase social welfare. In a perfectly competitive world, demand for out-of-state liquor can go up as a result of the relative price reduction for these Hawaiian wines. If, for example, nondrinkers mix the exempted wine with the out-of-state liquor, the change in demand for out-of-state liquor can be nil or even positive. Economic theory says that there will be some substitution toward other goods in general due to a relative price increase of a good, but theory does not tell us whether these Hawaiian wines are complements to or substitutes for out-of-state liquor. The effect of such a small price change is unlikely to be worth careful analysis (especially when the quantity change is also very small).

The majority in *Bacchus* asks whether the sign of the effect of the Hawaiian exemption is negative or positive. Despite the Easterbrook approach, it would seem that this theoretical insight does not always help the court in

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32. This point is made in a different context by Kaplow in *Antitrust, Law & Economics, and the Courts,* LAW & CONTEMP. PROBS., Autumn 1987, at 197-98, and *Extension of Monopoly Power Through Leverage,* 85 COLUM. L. REV. 515, 547 n.127 (1985). Justice Scalia makes a similar point in his concurrence in CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1652-53 (1987) ("I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other objective—or the ultimate (and most ineffable) judgment as to whether, given importance-level x, and effectiveness-level y, the worth of the statute is 'outweighed' by the impact-on-commerce z. . . . As long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny . . . whether it promotes shareholder welfare or industrial stagnation.").

33. Easterbrook ignores some economic theory in reaching this conclusion. Hawaii, a state with significant transportation costs between the mainland and its islands, is likely to have very little cheap wine shipped to it. This is true because for cheaper items, transportation costs are very large. This means that a market for cheap wine in Hawaii is unlikely to be competing with the relatively expensive wines that are transported into the islands. This is why one can buy better oranges in New York than in California. For a further discussion of this point, see A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 70-71 (3d ed. 1972).

34. The Theory of the Second Best states that mimicking the market (as is suggested by Easterbrook) will not necessarily increase total social welfare if the world is not perfectly competitive. In a world with significant competitive distortions, mimicking the market can increase, decrease, or leave unchanged social welfare. *See* C. GOETZ, LAW AND ECONOMICS: CASES AND MATERIALS 441-49 (1984).

reaching the right decision. Use of economic theory by the courts requires a model of judicial decisionmaking which cannot be satisfied by judicial reliance on economic principles.[35] Theory provides answers for judges only when the judge can be sure the theory is right and the measurement of the variables is accurate.[36]

Easterbrook also applies his strong approach to the Supreme Court's opinion in *Firefighters Local No. 1784 v. Stotts.*[37] *Stotts* involved the question whether affirmative action required Memphis to modify a consent decree so that black firefighters would not be the first laid off because they were at the bottom of the seniority ladder. The majority of the Court concluded that the provisions of Title VII do not permit the white workers to be laid off for the benefit of black incumbent workers because the hardship on the incumbent higher seniority white workers would be too great. Easterbrook argues that Title VII was interest group legislation and that this legislation clearly meant to give both incumbent white union members and black complainants something. In *Stotts,* Easterbrook argues, the limitation on black special interests concerns was modified by the limitation in Title VII of union rights. This view seems wrong. The purpose of Title VII was partially for efficiency reasons, that is, to eliminate the distorting effects of racial discrimination, and partially to reduce the perceived large inequality of income between black and white Americans. Title VII did place some equitable limitations on the ability of courts and administrative agencies to eliminate these problems. The question of how far the courts ought to go in protecting black rights (or the rights of other racial minorities and women), however, is an empirical question of how successful the law is in reaching the equitable and efficiency goals established by the legislation. If statutes (as a rough approximation) seem to do what the legislature intended them to do, then the courts should try to enforce the spirit of the act. The courts have altered the original view of the appropriate way to interpret the prohibitions in Title VII.[38] This change is appropriate or inappropriate as the court correctly or incorrectly perceives the empirical facts available to it. Easterbrook's suggestion to the court to use a particular kind of economic analysis is unhelpful in reaching a judicial decision because Easterbrook does not tell the court how it ought to determine the costs associated with the use of economic analysis. Without such a blueprint for costs, judges are left with no way to determine whether the theory they adopt is the appropriate one. In *Judex Economicus,* I suggest that it is possible to model Posner's versions of the assumptions that an economically sophisticated judge would adopt. In that article, I suggest that the starting place for judges in trying to determine when and how to use

35. *See* Culp, *Judex Economicus, supra* note 2, at 96. I argue that one of the main assumptions of the Posnerian model, rational expectations, suggests that no matter what goal is chosen by judges or legislatures for legal questions, economics does not provide definitive answers.

36. For a discussion of the problem for judges attempting to do this measurement, see *id.*

37. 467 U.S. 561 (1984).

38. Culp, *A New Employment Policy for the 1980s: Learning from the Victories and Defeats of Twenty Years of Title VII,* 37 RUTGERS L. REV. 895 (1985).

economics is to evaluate the assumptions that judges are making in coming to the economic conclusions. I also suggest that the assumptions advanced by Posner, in particular the assumption of rational expectations adjustment of legal participants, can lead to prescriptions for judges which are very non-Posnerian. Judge Easterbrook has not proven his case when he suggests that the courts have used too little economic theory in the analysis of Title VII without doing a fuller analysis of what other questions could have been asked. Increasing the scope of the use of economic analysis is costly. Economic sophistication is not enough to reach goals of social welfare maximization or individual equitable concerns.

This conference boasts two efforts at arguing for the strong view of the use of economics in judicial decisionmaking. These two papers by Professors Cooter, Rizzo, and Mr. Arnold produce two different kinds of models for understanding the nature of the judicial function. Cooter describes a model for common law interpretation and Rizzo and Arnold construct a model for statutory interpretation.[39] Professor Cooter constructs a model of ordered liberty and contrasts that model with the concept of wealth maximization. Cooter argues that the American and English systems of common law can be considered to be a product of the effort of the judges to maximize this notion of liberty. Cooter notes that there are other limitations on judges, including the need to follow the statutory strictures to maximize wealth or to engage in redistribution. Cooter suggests, however, that liberty is an important concept that judges ought to consider in interpreting the common law. A second example of the strong view of economic analysis is the paper by Mario Rizzo and Frank Arnold. These authors propose an economic model for statutory interpretation.[40] They argue that it is possible to describe a model in which the costs of failing to include or falsely including behavior that a costless legislature would have included in a statute should be appropriately minimized and that judges could use this model to determine the scope of statutory interpretation. Rizzo and Arnold argue that because both kinds of statutory error increase when vagueness of a statute increases, judges should not alter the scope of their statutory interpretation. In addition, Rizzo and Arnold contend that when the court can determine the scope of the likely errors either because of signals from the legislature or from other available information, judges should alter how broadly they interpret statutes accordingly. The authors would have judges alter what they do in statutory interpretation situations by having them focus on questions of the costs of not adhering to the legislature's purpose. This assumes, as the authors indirectly note, however, that there is such a solution for legislatures. Legislatures have no greater ability to create or have a single will than any other political body.[41] If courts cannot speak coherently with one voice because of the social

39. Cooter, *Liberty, Efficiency, and Law*, LAW & CONTEMP. PROBS., Autumn 1987, at 141.

40. Rizzo & Arnold, *An Economic Framework for Statutory Interpretation*, LAW & CONTEMP. PROBS., Autumn 1987, at 165.

41. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

choice problem associated with multiple member bodies, neither will legislatures. This strong view of economics asks judges to ask economic questions and to provide economic answers for many legal questions. However, no one, not even the most ardent economic adherent, believes that economics explains everything. If there is a question which has not been appropriately answered with respect to this strong view of economic analysis in the judicial process, it is to explain how judges are to determine when they should use these models.

Professor Kaplow takes on this strong view of the power of economics in the area of the law influenced by economics for the longest time: antitrust.[42] Kaplow argues that the Chicago view of law and economics has not triumphed as much as its protagonists suggest. Indeed, Kaplow suggests that the idea of this conference is misfocused. He believes that a focus on ideology on the bench would be a better beginning point for an evaluation of the impact of economics on the judicial process.[43] Kaplow contends, to paraphrase former Senator Aiken, that Posner and his Chicago School colleagues have declared intellectual victory and gone to the bench to enshrine it. Kaplow suggests that the declaration of victory has too easily been accepted by supporters and detractors and that, in fact, economic analysis has not triumphed in the Supreme Court's jurisprudence.[44] The Court has not adopted economic efficiency as the sole guide to antitrust jurisprudence. Kaplow carefully examines the history of antitrust policy to show that its recent shifts are neither based on the original intentions of Congress nor are they the necessary result of economic analysis. What he has found in this area most affected by economic analysis is politics lurking as neutral principle. One could ask, however, whether, if the notion of victory by economists is so widespread, that this perception has not in fact altered reality. Even if judges only believe that Chicago has triumphed because they have been tricked, it may be that tricks count. Judges, after all,. are not spending their time learning economics so that they can more easily communicate with their economically sophisticated law clerks. When judges focus on different assumptions of economics, they force legal participants to focus on different questions.[45] Judge Gibbons, in commenting on Kaplow's articles, suggests that there is a place where economics has influenced the Supreme Court's arguments. In *Monsanto v. Spray-Rite Service Corp.*,[46] Judge Gibbons contends that the Supreme Court suggested that lower courts could block challenges by private antitrust plaintiffs by raising the evidentiary standard for proof of concert of action in order to prove vertical price fixing. Judge Gibbons suggests that the Court tried to reach a result, which he thinks may be economically justified, by using procedural rules rather than directly altering

42. Kaplow, *supra* note 32, at 181.
43. *Id.* at 182.
44. *Id.* at 215-16.
45. *See* Culp, *Judex Economicus*, *supra* note 2.
46. 465 U.S. 373 (1911).

the statutory standard. Judge Gibbons concludes that this approach is inappropriate precisely because it does not honestly deal with the economic problem so that the economic decision can be affirmed or rejected easily by the legislative process.

The views of several of the judges at this conference support the arguments of Kaplow and Judge Gibbons. Judges Breyer and Higginbotham argued that, as appellate judges, their task was not to do economics but to determine whether the district judges had appropriately satisfied Rule 56 in making their decisions.[47] They contended that the question for the appellate judge is not primarily trying to maximize social welfare but to determine if the lower courts' rulings are supported by substantial evidence. Accordingly, the realm of opportunity for an appellate judge to use economic analysis is extremely limited. Chief Judge Wald in her discussion of the limits of economic analysis puts it best: Judges will not initiate economic analysis unless they are convinced that it is the appropriate analysis to apply to a particular legal problem.[48] Judges are often not the initiators of economic analysis and often will not apply economic analysis precisely because the task of doing economic analysis is limited by the resources of the judge. Chief Judge Wald argues cogently from the perspective of a sitting appellate judge that the assumptions made by the practitioners of the strong economic analysis can and will be challenged, and that this challenge will be productive, both in the sense of altering results and in the sense of leading to more appropriate results, only to the extent judges are able to resolve the questions posed by the assumptions made by the economic model. This ultimately is the puzzle all judges have to face in making decisions in an age of economics. Justice Whichard suggests that a similar problem exists for common law judges at the state level.[49] He believes that there are more important and appropriate principles than economics that judges should and do focus on in their decisionmaking. The lesson of this conference volume is that economics should be used to the extent that it helps to illuminate the questions that courts need to resolve. Several judges during the conference proceedings described situations where they believe economics helps illuminate that question. Whether economics is a help or a hindrance will depend on the case before a judge, the issue posed to the court, and the law. This volume begins to address the crucial question for modern judges of when and how economics is a help and a hindrance to the judicial process.

Two final puzzles emerge out of this conference. First, why is this art of economic sophistication emerging first among appellate judges? Second, will it spread to the activities of district court judges? It appears that the answer to the second puzzle is already clear. If appellate judges speak in the cadence of

47. Magat makes the same point about how economics ought to be used. Magat, *supra* note 23, at 88.

48. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1987, at 227-28, 244.

49. Whichard, *A Common Law Judge's View of the Appropriate Use of Economics in Common Law Adjudication*, LAW & CONTEMP. PROBS., Autumn 1987, at 253.

economics, then lower court judges will learn to respond in similar rhythms.[50] The answer to the first puzzle is less clear. We live in an age in which economic theory, whether deserved or not, has triumphed. The country deregulates the airline and telephone industries based on gains predicted by economic theory and alters the mammoth tax code to conform to economists' notions of marginal taxes. Black mayors call for reduced minimum wages for black teens. Liberal Democratic senators introduce a bill to protect contractual relationships concerning patents from the prohibitions of existing antitrust laws because they are convinced by economic arguments. Certainly, the appointment of economically sophisticated judges and the adoption of economic principles by them has a political component, an intellectual component, and, perhaps most importantly, a component rooted in the reality of constraints that limit the effectiveness of legal rules and policies. Judges use economic analysis because they are convinced that legal policies face real constraints and that these constraints can be illuminated by economic analysis. As long as economics contributes to understanding those constraints, judges will rely on economics and legislatures will write statutes in economic terms. The task for economically-sophisticated judges is to determine how much they can learn from economics, and the task for those of us preparing the next generation of legal participants is to teach them how to use economic principles without depriving them of the ability to see other noneconomic concerns or other modes of analysis. If judges are to keep their oath to do justice to the rich and the poor, they must learn to be appropriately economically sophisticated.

50. Ackerman, *supra* note 7. For an excellent example of the use of economic principles by then district court judge, see Judge Higginbotham's opinion in Vuyanich v. Republic Nat'l Bank of Dallas, 409 F. Supp. 1083 (N.D. Tex. 1976), *rev'd*, 723 F.2d 1195 (5th Cir. 1984). The perils of such sophistication are demonstrated by the reversal by the Fifth Circuit relying on the subsequent decision of the Supreme Court in General Tel. Co. v. Falcon, 457 U.S. 147 (1982). Judge Higginbotham later pointed out that the likely result of too much sophistication is the understandable decision of appellate judges to avoid the issue. *See* Higginbotham, *Introduction: A Brief Reflection on Judicial Use of Social Science Data*, LAW & CONTEMP. PROBS., Autumn 1983, at 9-10.