

# HOWARD LATIN'S ANALYSIS OF THE LEGAL AND ECONOMIC CONSIDERATIONS IN THE DECISIONS OF JUDGE BREYER

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## I

### INTRODUCTION

In selecting Judge Stephen Breyer's decisions as a "database" to examine the influence of economic reasoning in appellate decisionmaking, Howard Latin chooses an excellent example,<sup>1</sup> for Judge Breyer brings an unusually sophisticated understanding of economics to the bench. Breyer's earlier writings on regulatory law and economics are quite noteworthy, and Latin's interesting analysis provides new insight into his judicial philosophy. However, both of their conclusions on the role of economics in judicial decisionmaking are lacking.

A few years ago Judge Breyer observed that he had "seen few cases, if any, in the decision of which economics played an important role."<sup>2</sup> After reviewing Breyer's appellate decisions, Latin concludes that "although micro-efficiency effects may be worthy of judicial contemplation and may occasionally prove decisive . . . , systematic economic analysis can seldom provide the ultimate basis for judgments by appellate courts."<sup>3</sup> Given the proliferation of law and economics courses in law schools, the recent appointment of several distinguished law and economics scholars to the federal bench,<sup>4</sup> and the attention focused on the subject in academic journals and conferences,<sup>5</sup> their conclusions are surprising. If economics has contributed so little to appellate decisions, why has there been so much attention placed on the role of economics in law?

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

2. Breyer, *Economics for Lawyers and Judges*, 33 J. LEGAL EDUC. 294 (1983).

3. Latin, *supra* note 1, at 86.

4. Distinguished law and economics scholars recently appointed to the federal bench include Robert Bork, Frank Easterbrook, Douglas Ginsburg, Stephen Williams, Ralph Winter, Jr., and Richard Posner.

5. See, e.g., *Economists on the Bench*, LAW & CONTEMP. PROBS., Autumn 1987, at 1; *Symposium on Causation in the Law of Torts*, 63 CHI.-[KENT L. REV. 397 (1987); *Symposium on Richard Epstein's "Takings: Private Property and the Power of Eminent Domain"*, 41 U. MIAMI L. REV. 1 (1986); *Critical Issues in Tort Law Reform: A Search for Principles*, 14 J. LEGAL STUD. 459 (1985); *Antitrust and Economic Efficiency*, 18 J.L. & ECON. 245 (1985).

This comment presents three points concerning the role of economics in legal decisionmaking. First, neither Latin nor Breyer clearly distinguishes between the use of economic analysis in structuring legal decisions and reliance upon economic efficiency as the central decisionmaking criterion. Perhaps because of Judge Richard Posner's controversial and well-known position,<sup>6</sup> much attention in the field of law and economics has focused on economic efficiency as a guide for judicial decisionmaking, while neglecting economic analysis. However, rejection of economic efficiency as the central decisional criterion does not preclude the use of economic analysis in judgments based upon other criteria.<sup>7</sup>

Second, economic analysis provides a structure for the analysis of many cases. It offers a framework for systematically identifying important considerations in a decision, such as the costs, benefits, and distributional consequences of that decision. If judges use decisionmaking criteria that are based upon behavioral consequences of decisions rather than pure concern for the decisionmaking process, then they must be able to assess behavioral differences resulting from alternative judgments. Economics provides such a methodology for predicting the behavior of individuals and corporations under competing decisional outcomes. It should be noted that appellate and trial courts may have different needs for economic analysis. At the appellate level, the proper question is more likely whether the trial court *considered* the economic consequences of its decision, rather than whether it reached the *correct* economic decision.

Finally, Latin's taxonomy of six decisional criteria (allocation of institutional responsibilities, justiciability constraints, unquantifiable and incommensurable interests, fairness and evenhanded justice, global efficiency effects, and microefficiency effects)<sup>8</sup> unnecessarily isolates economic efficiency as only one of the six criteria for reaching legal decisions. Welfare economics has developed a precise definition of economic efficiency that is much broader than Latin's concept of microefficiency effects.<sup>9</sup> By utilizing welfare economics' definition of economic efficiency and its additional evaluative criterion of distributional equity,<sup>10</sup> one can collapse Latin's six criteria into two. As in any problem with multiple objectives, reducing the number of objectives decreases the number of trade-offs which must be considered and makes systematic decisionmaking easier.

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6. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

7. See Breyer, *Economics and Judging: An Afterword on Coote and Wald*, *LAW & CONTEMP. PROBS.*, Autumn 1987, at 248; Gibbons, *Antitrust, Law & Economics, and Politics*, *LAW & CONTEMP. PROBS.*, Autumn 1987, at 217-18.

8. Latin, *supra* note 1, at 58, 59-71.

9. See A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975).

10. See *id.*

## II

## REINTERPRETATION OF LATIN'S SIX DECISIONAL CRITERIA

In order to understand better the proper role of economic efficiency in judicial decisionmaking, and to appreciate better the role of economic analysis in those decisions, it is useful to reinterpret Latin's six decisional criteria in light of traditional definitions of economic efficiency and distributional equity found in welfare economics.

## A. Allocation of Institutional Responsibilities

There is no question that "[t]he authority of federal appellate courts is frequently circumscribed by their need to preserve the decisionmaking prerogatives of other institutions."<sup>11</sup> Based on his review of Judge Breyer's appellate decisions, Latin concludes that this first criterion was more important in determining the outcomes of Breyer's decisions than any of the other five.<sup>12</sup> This conclusion, however, need not imply that courts must ignore economic efficiency or distributional equity when considering the decisionmaking prerogatives of lower courts, regulatory agencies, or legislatures. General rules for deciding cases or issuing regulations can have a firm base in economic efficiency or equity criteria, even if specific applications of those rules lead occasionally to inefficient decisions.

The broader, more precise definition of allocative efficiency does not require reversal of lower court or regulatory agency decisions whenever new knowledge is acquired which indicates that those decisions were flawed. This is an example of the classic economics problems of one instrument (in this case, the original decision by the lower court) controlling two variables (the past actions and future actions governed by the decisions). Under one view, deference to precedent eliminates the risk that would otherwise ensue if, at a later date, another court overturned precedent and thus created financial losses for parties relying upon it. Conversely, precedent which is later discovered to be inefficient perpetuates wasteful behavior. In deciding whether to disturb precedent, a court must provide incentives for efficient behavior in the future, without either creating additional risk that precedent will again change or imposing undue adverse distributional consequences on individuals and organizations which relied upon precedent as a basis for their past decisions.

This trade-off suggests that courts should overturn precedent only when it is discovered to be particularly inefficient. When reversing precedent, courts should carefully craft the new judicial policy such that the costs of reversal are acceptable to disadvantaged parties. Options for minimizing the cost of reversing lower courts and regulatory agencies include limiting the size of the class of cases in which the law is changed, grandfathering parties covered under the old ruling, or paying compensation to those parties suffering losses

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11. Latin, *supra* note 1, at 59.

12. *Id.*

as a consequence of the reversal.<sup>13</sup> Of course, the courts have less power to provide compensation than do legislatures.

With a particularly nice example, Latin illustrates that deference to the orderly allocation of institutional responsibilities sometimes requires courts to forego single-minded pursuit of economic efficiency.<sup>14</sup> In several utility regulation cases before Judge Breyer, the Federal Energy Regulatory Commission sought to reduce future natural gas rates.<sup>15</sup> Following controlling Supreme Court authority, Breyer blocked the agency's proposed action even though it would have resulted in more efficient rates.<sup>16</sup> However, when the structure of governmental decisionmaking permits courts to alter precedent, they must know the magnitude of the efficiency and distributional effects of such a change in order to balance those effects against the inherent stability of settled precedent.

### B. Justiciability Constraints

Justiciability constraints based on doctrines such as mootness, ripeness, and standing also may be interpreted as judicial responses to the objective of promoting economically efficient behavior. Because appellate courts can devote significant amounts of time to only a limited number of cases, they must focus their efforts upon those cases with the greatest potential precedential impact. This raises the question of how to allocate the court's fixed resources for decisionmaking among all the cases which come before it. Unless resources are unlimited, the answer necessarily requires that judges give some discretion to lower courts and administrative agencies. The necessary implication is that there will be some disputes that a reviewing court would have decided differently if it had the time to review them *de novo*. Given limited judicial resources, spending more time reviewing some cases will cause others to be inadequately reviewed, if reviewed at all.

Breyer's decision in *Berkshire Cablevision of Rhode Island, Inc. v. Burke*<sup>17</sup> is a good example of the interplay between justiciability constraints and economic efficiency objectives. Latin argues forcefully that economic efficiency would have been better served if Breyer had decided *Berkshire* on its merits, rather than refusing to adjudicate it for mootness.<sup>18</sup> Even if appellate courts could disregard mootness doctrine in order to promote economic efficiency, it would be quite difficult to determine which "moot" cases deserve further analysis. Moreover, substantive questions could be much more difficult than questions of mootness. However, if an adjudication of mootness in a given

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13. See, e.g., Harrison & Portney, *Who Loses from Reform of Environmental Regulation?*, in REFORM OF ENVIRONMENTAL REGULATION 147 (W. Magat ed. 1982).

14. Latin, *supra* note 1, at 60-61.

15. See *Distrigas of Mass. Corp. v. Federal Energy Regulatory Comm'n*, 737 F.2d 1208 (1st Cir. 1984), *appeal following remand for further proceedings*, 751 F.2d 20 (1st Cir. 1984); *Distrigas of Mass. Corp. v. Boston Gas Co.*, 693 F.2d 1113 (1st Cir. 1982).

16. See *Distrigas of Mass. Corp. v. Federal Energy Regulatory Comm'n*, 751 F.2d 20, 22 (1st Cir. 1984).

17. 773 F.2d 382 (1st Cir. 1985).

18. Latin, *supra* note 1, at 61-62.

case guides actors' decisions in future similar disputes, mootness may provide appellate courts with an efficient screen for substantive questions in selecting cases upon which to focus significant resources.

### C. Unquantifiable and Incommensurable Interests

Both Judge Breyer and Professor Latin agree that economic analysis is of little use in deciding cases based on theories involving the right to free speech, due process of law, or equal protection.<sup>19</sup> Distinguishing between "economic methodology" and "economic terminology" in order to set himself apart from Posner and Gary Becker, Latin argues that the Chicago School uses only economic terminology instead of economic methodology.<sup>20</sup> Posner's 1986 Richard T. Ely Lecture,<sup>21</sup> which provides an enlightening economic analysis (using economic methodology) of the first amendment rights to free speech and religious freedom, demonstrates, however, that Latin's distinction does not work. Indeed, the more interesting question here is the *extent* to which cases involving rights should be decided on the basis of economic efficiency.

### D. Fairness and Evenhanded Justice

Latin introduces this fourth criterion to distinguish between fairness issues involving the *process* by which the legal system reaches decisions and the equity of the social *outcomes* produced by those legal decisions.<sup>22</sup> This is a useful distinction, and economists ought to recognize that questions of fairness can revolve around process issues as well as allocational effects of decisions.

Consider the example which Latin presents regarding recovery for pure economic losses in tort cases.<sup>23</sup> Latin argues that economic analysis will be of little use to courts comparing the magnitude of the plaintiff's damages, a traditional economics issue, and the defendant's degree of culpability, an issue of process fairness, in order to decide whether to permit recovery of pure economic losses.<sup>24</sup> Perhaps economics cannot help resolve this fairness question, but it can identify the distributional consequences of allowing recovery. Without knowledge of these distributional consequences, judges would be left with highly abstract and imprecise theories with which to resolve the matter.

### E. Global Efficiency Effects

By distinguishing this criterion from the last criterion of microefficiency effects, Latin recognizes that economic efficiency can be examined with either

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19. *Id.* at 62-63.

20. *Id.*

21. Posner, *The Law and Economics Movement*, AM. ECON. REV. PAPERS & PROC., May 1987, at 1.

22. Latin, *supra* note 1, at 63.

23. *Id.*

24. *Id.*

a short run (case-by-case) approach or a long run (multicase) approach.<sup>25</sup> Selection of the proper economic efficiency criterion depends upon whether it is administratively feasible and affordable for courts to resolve all issues on a case-by-case basis. The criterion of global efficiency effects recognizes that courts possess limited resources and that case-by-case efficiency analyses may be very difficult to carry out.<sup>26</sup> Concerns for simplicity, uniformity, judicial economy, and administrability express the need for courts to adopt an approach based on the simultaneous consideration of an entire class of related cases, rather than resolving disputes on a case-by-case basis.

Contrary to Latin's view that economics was not important in resolving *Kartell v. Blue Shield of Massachusetts, Inc.*<sup>27</sup> and *Barry Wright Corp. v. ITT Grinnell Corp.*,<sup>28</sup> those decisions illustrate the need for rigorous use of economic reasoning. In *Kartell*, Breyer drew upon his economics background by reasoning that, to the extent there is competition in the market for medical services, grossly inefficient pricing practices cannot long survive.<sup>29</sup> Likewise, his finding in *Grinnell* that "this type of attack on prices that exceed both incremental and average costs would more likely interfere with the procompetitive aims of the antitrust laws than further them"<sup>30</sup> again displayed classical economic reasoning.

#### F. Microefficiency Effects

Latin argues that *Kenworth of Boston, Inc. v. Paccar Fin. Corp.*<sup>31</sup> is Judge Breyer's decision most nearly determined by considerations of economic efficiency.<sup>32</sup> Nevertheless, he contends, even *Kenworth* ultimately was decided on grounds other than economic efficiency.<sup>33</sup>

Latin has misinterpreted the decision. Economic analysis is particularly important in antitrust and regulatory cases. *Kenworth* was easy to decide because it presented no tying arrangement.<sup>34</sup> However, in cases with true tying arrangements, economic analysis is important in *predicting* market allocations which would result with and without the tying arrangement. For example, if the firm with the tying arrangement lacks market power, then market forces will discipline any inefficient allocational effects caused by the arrangement. Thus, while decisions such as *Kenworth* ultimately may rest upon criteria other than allocative efficiency, economic efficiency is

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25. *Id.* at 65.

26. *Id.* at 67-68.

27. 749 F.2d 922 (1st Cir. 1984).

28. 724 F.2d 227 (1st Cir. 1983).

29. 749 F.2d at 927-28.

30. 724 F.2d at 236.

31. 735 F.2d 622 (1st Cir. 1984).

32. Latin, *supra* note 1, at 69.

33. *Id.* at 70.

34. 735 F.2d at 624. "A tying arrangement is the sale or lease of one item ('tying product') only on condition that the buyer or lessee take a second item ('tied product') from the same source." P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 733(a) (1978). For a discussion of the legality of tying arrangements, see *id.* at ¶ 733.

indispensable to a court's proper *understanding* of the effects of tying arrangements.

### III

#### CONCLUSION

Howard Latin provides a fascinating account of how Judge Breyer uses and chooses not to use economic analysis in his decisions. By arguing that economics is of little use in appellate decisionmaking, Latin challenges the view shared by many scholars and judges that economics presently is employed widely in legal decisionmaking and should be used even more often.

With a view of economics broader than Latin's, one finds a much more important role for economic analysis in appellate decisionmaking. First, while economic efficiency need not be given central importance as a decisionmaking criterion, economic analysis provides an invaluable methodology for predicting the behavior of individuals and corporations under competing decisional outcomes. Second, economic analysis provides judges with a highly useful structure for analyzing cases. Finally, when broadly construed, the two criteria of economic efficiency and distributional equity encompass the six narrower decisional criteria which Latin offers, thus considerably simplifying the analysis necessary to reach judicial decisions under his taxonomy.

