

# Richard Posner's Praxis

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My purposes are four. First, I reveal the internal logic of Richard Posner's microeconomic conception of judicial efficiency to be fallacious, partly for reasons indigenous to his particular formulation of it and partly for reasons that have long been known by welfare economists and political scientists to attend various compensation-based theories of allocative efficiency. Second, I show that in his writings about the federal courts and his advocacy of efficiency as a basis for common law making and statutory interpretation, Posner employs a conception of macroeconomic judicial efficiency that is not derived from his microeconomic theory and which is inconsistent with it. Third, by analyzing opinions he has written as a federal appellate court judge on the Seventh Circuit since 1982 in two areas—labor law and antitrust—I establish both that he fails to adhere consistently to either his microeconomic or his macroeconomic conceptions of efficiency as a judge, and that in the course of those decisions he reifies contentious and indeterminate economic theories by presenting them as uncontroversially “scientific.” Last, I spell out the main distributive and ideological implications of his enterprise.

## I. WEALTH MAXIMIZATION AS JUDICIAL EFFICIENCY: THE MICROECONOMIC THEORY

The much celebrated and criticized “law and economics” movement has found its most lucid, prolific, and influential exponent in the person of Richard Posner. For over a decade he has championed the view that the common law is best understood in terms of the theory of economic efficiency,<sup>1</sup> that “the basic function of law” is to “alter incentives” to maximize the efficient production of wealth.<sup>2</sup> Just what efficiency means will concern us shortly, but note to begin with that he advocates this theory in both descriptive and normative senses. Along with several other commentators,<sup>3</sup> he has argued that the theory of economic efficiency explains the historical evolution of American common law (in directly “economic” fields such as antitrust and other regulatory law, as well as in such areas as torts, contracts, family law, products liability, and in many others), and, more contentiously, that the theory of efficiency should provide the basis for common law adjudication in a wide variety of noneconomic fields of law. Although professing agnosticism on the subject of how

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1. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972) [hereinafter POSNER, *ECONOMIC ANALYSIS*]; POSNER, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979) [hereinafter POSNER, *Some Uses and Abuses*]; POSNER, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter POSNER, *Ethical and Political Basis*]; R. POSNER, *THE ECONOMICS OF JUSTICE* (1981) [hereinafter POSNER, *ECONOMICS OF JUSTICE*].

2. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 75.

3. See, e.g., Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). See also Posner, *Some Uses and Abuses*, *supra* note 1, at 281–91 (for a brief history of the “law and economics” movement with extensive citations).

much of the legal terrain the economic analysis of law does and should govern, holding that this cannot be resolved *a priori*, that it is an empirical question to be settled as the practitioners of the law and economics movement attempt to apply it,<sup>4</sup> he has suggested that economic analysis has application in torts, contracts, commercial law, property, procedure, remedies, criminal law, family law, intellectual property, and in all areas of law that have common law or “quasi common law” components, including antitrust law and constitutional law. In addition he suggests that economic analysis applies in the process of statutory construction.<sup>5</sup>

There is an apparent tension between these descriptive and normative claims, since these descriptive claim has an “invisible hand” component—that common law judges have maximized efficiency without intending to or even knowing what they were doing, simply by applying such traditional common law notions as the negligence standard in torts and products liability.<sup>6</sup> And Posner has criticized judges for trying to apply the theory of efficiency “directly,” arguing that they misunderstand and misuse it. He is critical, for instance, of Judge Sneed’s attempt to apply economic analysis in *Union Oil Co. v. Oppen*,<sup>7</sup> arguing that the judge misunderstood Professor Guido Calabresi’s theory of minimizing accident and avoidance costs that he was attempting to apply.<sup>8</sup> But Posner contends that Sneed nonetheless reached the “economically sensible” result, even though he was “unable to articulate it successfully in economic terms.”<sup>9</sup> Likewise with Sneed’s nineteenth century predecessors, in Posner’s view, while it is “even less likely” that they would have “wanted or been able to cast their opinions in explicit economic terms, for there was much less awareness of the technical concepts of economics,” it does not follow that their opinions did not make “implicit economic sense.”<sup>10</sup> Taken to its logical conclusion, this reasoning would seem to suggest that the best way to promote “economically rational” adjudication would be for judges to ignore economics entirely, at least in the absence of some additional theoretical argument. This claim

4. [T]he limitations of economics [in legal analysis and adjudication] cannot be determined a priori, but only by the efforts of scholars to apply economics to hitherto unexplored areas of the legal system. One can reach the outer bounds of a discipline only by pushing outwards. Eventually a point will be reached where the economic theory ceases to have substantial explanatory power. Then we will know the limitations of the economic analysis of law; we do not know them yet.

Posner, *Some Uses and Abuses*, *supra* note 1, at 297.

5. *Id.* at 296; R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 261–315 (1985) [hereinafter POSNER, *THE FEDERAL COURTS*].

6. See Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). But see Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

7. 501 F.2d 558 (9th Cir. 1974).

8. *Oppen* was a suit by a commercial fisherman whose livelihood had been harmed by the Santa Barbara oil spill of 1969. At issue was whether the defendant oil companies could be held liable for an injury to the plaintiff’s loss of expected business (as opposed to harm to a vested property right). Judge Sneed held that the defendant was liable in part by reference to Calabresi’s theory of strict liability, in terms of which losses should be allocated to the party best able to avoid the costs of accidents. G. CALABRESI, *THE COSTS OF ACCIDENTS* 143–52 (1970). Posner’s objection is not to the result reached by Judge Sneed, but rather to the discussion of Calabresi’s test and the fact that he reached the result by interpreting the defendant’s stipulation as an admission of negligence, as well as the fact that he engaged in what Posner takes to be irrelevant discussion of the effects of the accident on consumption goods. Posner, *Some Uses and Abuses*, *supra* note 1, at 298–99.

9. *Id.* at 300–01.

10. *Id.* at 297–301.

is perhaps analogous to Justice Holmes's theory that once the historical evolution of the common law had been fully grasped it could be jettisoned in favor of "scientific" principles which would do the same job that the common law adjudication had done hitherto, but more efficiently because more directly.<sup>11</sup> Posner offers no comparable argument, however, and in several places he explicitly advocates efficiency as a normative basis for adjudication. He also argues that the overload crisis in the federal courts could be alleviated somewhat if both legislators and judges took better account of efficiency.<sup>12</sup> The implications of this tension will be considered later, after I have disentangled Posner's different notions of efficiency invoked in different contexts. The propositions I intend to examine first are the descriptive and normative versions of Posner's microeconomic thesis, the precise meaning of the claim that the common law is efficient, and the relationship between this and the claim that it ought to be.

How are we to interpret the claim that the common law is efficient? Posner tells us that "[t]he hypothesis is not that the common law does or could perfectly duplicate the results of competitive markets," rather it is that "within the limits of administrative feasibility, the law brings the economic system closer to producing the results that effective competition—a free market operating without significant externality, monopoly, or information problems—would produce."<sup>13</sup> The common law promotes efficiency in the face of these various forms of market failure. And it is just for this reason that he needs a more complex notion of efficiency than simple Pareto-optimality, for this latter comes about, by definition, when unregulated markets are well-functioning. In fact Posner's conception of microeconomic efficiency is a second cousin of the notion of compensation developed by Kaldor and Hicks in the late 1930s and early 1940s.<sup>14</sup> He develops it by distinguishing it from classical utilitarianism and from the neoclassical Pareto system.<sup>15</sup>

The difficulties with classical utilitarianism in Posner's view are three. First, there are philosophical difficulties with the notion that the only value for which people strive is pleasure. Second, there are various problems of "domain"—external effects on others of pursuing happiness—and problems in defining the class of beings whose utility is to be maximized.<sup>16</sup> Third, there are all the difficulties of measurement and administration of the utility principle—whether and how the utility of some might be sacrificed to benefit others, for "there is no reliable technique for measuring a change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another."<sup>17</sup> To avoid these difficulties Posner begins by defining efficiency in terms of "wealth-maximization," thereby avoiding the metaphysical questions about happiness that have been thought by many since G.E. Moore to

11. O. HOLMES, *THE COMMON LAW* 31–33 (1963).

12. See, e.g., POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 294.

13. POSNER, *Some Uses and Abuses*, *supra* note 1, at 288–89.

14. See I. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 84–128 (1950); M. DOBB, *WELFARE ECONOMICS AND THE ECONOMICS OF SOCIALISM* 77–118 (1969).

15. See Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 236 (1980) [hereinafter Kronman, *Wealth Maximization*] (arguing that wealth-maximization is analytically equivalent to the Kaldor-Hicks test). See also Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 532–34 (1980).

16. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 52–53.

17. *Id.* at 54.

render it hopelessly circular.<sup>18</sup> In fact, this was a move that even Jeremy Bentham had made implicitly, by arguing that money can function as a proxy for utility, and by holding that the redistribution of wealth should always be limited by the requirement of "abundance." Although, *ceteris paribus*, the principle of diminishing marginal utility requires downward redistribution of wealth, we should never redistribute beyond the point which would have negative effects on the production of abundance, because in the long run this would diminish overall utility.<sup>19</sup> But whereas Bentham saw preserving abundance as one necessary condition for maximizing utility, Posner's view is that efficiency should be defined as wealth-maximization, making any connection with happiness purely contingent.<sup>20</sup>

The other two difficulties of classical utilitarianism, concerning domain and utility measurement, are more serious from the standpoint of a theory of adjudicative efficiency. In the history of welfare economics, both were neatly resolved by the rejection of the interpersonal cardinal utility scales Bentham had worked with and their replacement with the doctrine of ordinal utility and the theory of revealed preference enshrined in the Pareto principle. Ordinal utility scales required much more easily obtainable information since they ruled out interpersonal comparisons by definition and they were concerned only with marginal changes. It was not necessary to know an agent's entire preference ranking, nor the intensity of his preferences, to predict his behavior at the margins from a given status quo. The theory of revealed preference solved the problem of how to get even this limited information: the market would reveal it. Assuming that people only make exchanges that benefit themselves, all exchanges that occur must be Pareto superior by definition, else they would not occur, and when all voluntary transactions have ceased the result must by definition be Pareto optimal. There are no further exchanges which would benefit at least one individual while harming none. It may, of course, be true that if we took some wealth from Peter and gave it to Paul, the increment in Paul's wealth would be greater than the loss to Peter (and the total amount of utility in society thereby increased) but by the Pareto principle we can never know that this is the case, since utility functions of individuals cannot be compared. On these Pareto noncomparable transactions, neoclassical welfare economics was silent. Professor Coase's famous theorem,<sup>21</sup> which did more than any other single development to get the "law and economics" movement off the ground, was basically the lawyer's analogue of the Pareto principle. It held, *ceteris paribus*, that in the absence of information costs, wealth effects, external effects and other blockages to exchange such as free riding, no

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18. *Id.* at 51-52. See also Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

19. Bentham, *The Psychology of Economic Man*, in 3 JEREMY BENTHAM'S ECONOMIC WRITINGS 439-43 (Stark ed. 1954) Note also that where Posner always thinks in terms of total utility, Bentham's principle was that we should maximize the greatest happiness of the greatest number, a requirement with quite different distributive implications. Depending on our reading of Bentham, this can mean maximizing the utility of a majority, or of a plurality, whereas Posner's "total utility" criterion will in some circumstances be met by maximizing the utility or wealth of a minority. The implications of this will concern us shortly in our discussion of allocational *versus* distributive efficiency.

20. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 60-65.

21. COASE, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

system of liability rules is more efficient than any other, since, whatever the system, people will make exchanges to produce Pareto-optimal results.

From the standpoint of a theory of adjudicative efficiency the Pareto principle has two sorts of defects. First, there is the difficulty which Posner refers to as that of "domain," the problem of whose utility is to be taken into account. The Pareto principle takes it for granted that we know who the parties to a given transaction are. But in reality this is seldom unproblematic, particularly in the law, where what the economists think of as "external effects" of transactions are often what is centrally in contention. This is not quite how Posner construes the boundary problem of classical utilitarianism. He sees the problem centrally as one of what beings to take into account in the utilitarian calculus—whether to include animals and foreigners, and perhaps even alien beings—for

the logic of utilitarianism seems to favor setting as the ethical goal the maximization of the total amount of happiness in the universe. Since this goal seems attainable only by making lots of people miserable, (those of us who would have to make room for all the foreigners, sheep, or whatever), utilitarians are constantly seeking ways to construct the boundary. But to do so they must go outside of utilitarianism.<sup>22</sup>

Posner regards his turn to wealth-maximization as a solution to this problem, for we now have a criterion for drawing the boundaries. "Animals count," he tells us, "but only insofar as they enhance wealth. The optimal population of sheep is determined not by speculation on their capacity for contentment relative to people, but by the intersection of the marginal product and marginal cost of keeping sheep."<sup>23</sup> Likewise, with foreigners the theory of wealth-maximization suggests that a policy of "free immigration with no public support for the immigrant will [ensure] that only wealth-maximizing immigration occurs" since "[n]o one will immigrate who anticipates an income lower than the costs of maintaining himself."<sup>24</sup>

Passing over the fact that Posner's theory ignores the circumstances which the immigrant is leaving, these examples indicate both that Posner fails to avoid the boundary problem that he identifies in utilitarianism, and that his own approach is deeply problematical. The examples fail to solve the boundary problem because Posner does not see that it is part of a much more general problem about action. The problem about animals (if we really have to play these conceptual games with Posner) is not that we no longer have to speculate about their happiness, but rather that they may have a different way, which we may not understand, of deciding what counts as wealth and wealth-maximization. With foreigners, the very definition of them as foreigners assumes what Posner has to prove, because individuals may well challenge our right to designate them as foreigners. From the standpoint of pure economic theory, we have no more business regarding them as foreigners than we do regarding the people in the next town as foreigners, or than do American Indians have regarding us as foreigners for that matter. Indeed, in many cases the problem of boundaries will

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22. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 52–54.

23. *Id.* at 76.

24. *Id.* at 78.

masquerade as a problem of external effects, as when an individual's property value is harmed, or when a worker loses his job as the result of a factory's relocation to another state, and the owner argues that these are not relevant effects from the point of view of evaluating his action. The theory of wealth-maximization presents exactly the same difficulties as utilitarianism presents in defining boundaries for, ultimately, they are unresolved problems in the philosophy of action.

Posner's discussion is illuminating, nonetheless, because it throws into sharp relief the deeply questionable assumptions about allocative and distributive efficiency implicit in his argument. If wealth-maximization is the key criterion of efficiency, the theory tells us to pay attention to distributive questions only to the extent that they are pertinent to maximizing wealth. As he admits, "people who lack sufficient earning power to support even a minimally decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth."<sup>25</sup> Posner considers and rejects the Rawlsian critique of this view—namely that it gives people an unfair advantage because of such random characteristics as intelligence and feeble-mindedness<sup>26</sup>—and argues instead that "[t]o treat the inventor and the idiot equally concerning their moral claim to command over valuable resources does not take seriously the differences between persons. And any policy of redistribution impairs the autonomy of those from whom redistribution is made."<sup>27</sup> Posner sidesteps the fact that this procedure may violate the autonomy of the poorly endowed with the quip that although this "grates on modern sensibilities," he sees "no escape from it that is consistent with any of the major ethical systems."<sup>28</sup> This is, of course, notably less than an argument, and it embodies distributive assumptions that have long been known to be deeply problematical to welfare economists.

It is important to remember that Posner's wealth-maximization test, like the compensation tests developed by Kaldor, Hicks, and Scitovsky, comes into play in situations of market failure, when a disinterested party, such as a judge (or a legislature in the case of welfare economics), must reallocate wealth to produce a Pareto-optimal result which, for one reason or another, is not generated in an unregulated market.<sup>29</sup> It is in this type of context that the various compensation tests and Posner's wealth-maximization criterion are brought into play. The logic behind all of these is a theory of hypothetical compensation. The early compensation theorists wanted to find a way of discussing Pareto-undecidable outcomes that increased overall welfare. Intuitively, if an exchange could occur between A and B (but does not) whereby A would gain more than B would lose, it seemed plausible to say that overall social product or welfare had increased. They wanted to argue this, however, without invoking the whole Benthamite system of interpersonally compa-

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25. *Id.* at 76.

26. As Posner summarizes this view: "If [an individual] happens to be born feeble-minded and his net social product is negative, he would have no right to the means of support even though there was nothing blameworthy in his inability to support himself." *Id.*

27. *Id.*

28. *Id.*

29. For two useful discussions, see Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980); Coleman, *supra* note 15, at 509.

rable cardinal utilities and its radically redistributive implications. It was this need that generated the claim that if A could compensate B for B's loss and still be better off than at the status quo ante, the total product would have increased, even though no compensation occurred in fact. Now as Professor Little and others long ago observed,<sup>30</sup> it is a curious notion of welfare which holds that if I take your assets, provided I could in principle (but do not in practice) pay you for them and still be better off, the welfare of both of us has increased. But more to the point here, despite the formidable series of theoretical efforts from Kaldor and Hicks to Samuelson to derive a compensation theory from ordinalist premises, there is now a very wide consensus among welfare economists that this cannot be done, and that all the hypothetical compensation tests implicitly employ full-blown cardinal systems.<sup>31</sup> In the context of Posner's particular application of the Kaldor-Hicks test, this means that the deciding third party must make her own evaluation, not only of who would be hurt and who would be benefited in what amounts by her forced reallocation of resources (which I discuss shortly), but she would also need an independent theory of economic growth to tell her what allocation of resources would maximize wealth in fact. This immediately requires that the judge depart from the realm of microeconomic logic to a causal and empirical theory of how the economy operates, of how wealth in fact is maximized. So one might imagine that a judge who believes in neoclassical theories of investment incentives would do everything she could to minimize awards in Social Security and unemployment compensation cases before her, on the grounds that increases in transfer payments increase taxation burdens and minimize investment. A Keynesian judge, on the other hand, would adopt the converse policy and make awards as generous as possible, since transfers from those with a low marginal propensity to consume to those with a higher one will stimulate demand, and, hence, production and overall social product or wealth. Or, in terms of Posner's example, the Keynesian theory might tell us to subsidize immigration as a means of stimulating demand and, as a result, of maximizing wealth. In other words, Posner's theory of wealth-maximization cannot be applied without the judge, or decision-maker, employing a controversial and contentious empirical theory of what maximizes wealth (with major distributive implications), and it is difficult to see why one such theory should be preferred over others. What Posner in fact does, as I shall discuss, is reify one such controversial theory which generates distributive results congenial to him, and then presents it as "the" economic theory of adjudication.

Once it becomes clear that Posner's theory requires a full-blown cardinal system, it is also clear that he confronts all the measurement problems that have always attended classical utilitarianism. He needs some independent, interpersonally comparable, basis in terms of which a disinterested third party can determine whether the benefit to A does in fact exceed the detriment to B in a forced transaction, and by

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30. See I. LITTLE, A CRITIQUE OF WELFARE ECONOMICS 84-116 (1950); J. FISHKIN, TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES 91-96 (1979); Kronman, *Wealth Maximization*, *supra* note 14, at 236-39. See also I. SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 169-78 (1986) [hereinafter SHAPIRO, EVOLUTION OF RIGHTS].

31. M. BLAUG, ECONOMIC THEORY IN RETROSPECT 602-44 (3d ed. 1978) (an up-to-date and accessible discussion of these issues can be found in the chapter on general equilibrium and welfare economics).

how much. Compensation theorists have traditionally employed money as their basic unit of account, but among the difficulties with this is that it makes it impossible to assess compensation independently of so-called "wealth-effects" or "income-effects" on demand. Once we place the individuals we are assessing in anything which is a logical analogue of an Edgeworth Box, we are giving decisive moral weight to their capacity to realize their preferences in principle from a given status quo. This is why a standard criticism of the Pareto system has always been that it implicitly ascribes moral respectability to the status quo, which in turn delimits the range of superior and optimal outcomes. This is in fact a double problem for Posner, because while the status quo could be argued to respect autonomy from Pareto's premises,<sup>32</sup> there is no particular reason to respect the status quo from the the point of view of wealth-maximization. There is in fact no particular reason to respect property rights at all from the standpoint of this radically consequentialist ethic; if state ownership of the means of production could be shown to maximize overall wealth it should be preferred on his theory. Now Posner has no intention of wandering anywhere near this conclusion, of course, and he avoids it by committing to the empirical thesis that individual property rights, when allocated through markets as a by-product of "economic liberty" and then preserved by legal rules, maximize a society's wealth. "It is the almost universal opinion of economists (including Marxist economists)," he remarks with quite staggering offhand confidence, "that free markets, whatever objections can be made to them on grounds of equity, maximize a society's wealth."<sup>33</sup> This means that a system of private property rights and free markets, upheld and preserved through the courts, best maximizes wealth. "The theory of property rights" he tells us (as though there was one theory) "is an important branch of modern microeconomic theory. A property right, in both law and economics, is a right to exclude everyone else from the use of some scarce resource."<sup>34</sup> From the point of view of economic theory, absolute property rights are desirable "when the costs of voluntary transactions are low."<sup>35</sup> As transactions costs increase, it makes increasing economic sense for the state to become involved in their allocation and reallocation.<sup>36</sup> In these latter circumstances, rights should be reallocated by the state in accordance with the theory of wealth-maximization, although again, Posner never makes clear what theory is to be employed. He simply asserts as follows:

If transaction costs are positive . . . the wealth maximization principle requires the initial vesting of rights in those who are likely to value them most, so as to minimize transaction costs. This is the economic reason for giving a worker the right to sell his labor and the woman the right to determine her sexual partners. If assigned randomly to strangers, these rights would generally (not invariably) be repurchased by the worker and the woman; the

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32. In my view, this is not very plausible. See SHAPIRO, *EVOLUTION OF RIGHTS*, *supra* note 30, at 165-78 (discusses these issues in relation to Nozick's theory of justice-in-transfer).

33. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 67 (no references to the writings of any economists, Marxist or other, are cited in support of this assertion).

34. *Id.* at 70.

35. *Id.*

36. *Id.*



costs of the rectifying transaction can be avoided if the right is assigned at the outset to the user who values it the most.<sup>37</sup>

This is doubly question-begging. First, Posner gives no indication of how to determine what the most efficient initial endowment is. Second, he pays no attention to the fact that the existing distribution of wealth at a given time will limit an individual's capacity to buy the things he values the most. In a regime which assigned the right to choice of a woman's sexual partner to someone else (such as her father), who is to say that she would have the resources to purchase that right? To assume that she would is to assume exactly what Posner has to prove if his theory is to make any sense. As a generalized theory of the origins of property rights this notion is incomplete, since prior to the existence of property there would be nothing for which to exchange rights.<sup>38</sup> To posit this as a generalized theory of property endowments simply replicates and exacerbates the inequalities that prevail in a society. Posner denies this by empirical assertion:

[T]he assignment of rights at the outset of social development is unlikely to determine the allocation of resources many generations later. Suppose at the beginning one man owned all the wealth in a society. To exploit that wealth, he would have to share it with other people—he would have to pay them to work for him. His remaining wealth would be divided among his children or other heirs at his death. Thus, over time, the goods and services produced and consumed in the society would be determined not by his preferences but by those of his employees and heirs. Probably after several generations most prices in this society, both market and shadow prices, would be similar to those in societies in which the initial distribution of wealth was more equal. If so, it means the initial distribution of wealth will eventually cease to have an important effect on the society's aggregate wealth.<sup>39</sup>

This is sheer fancy, and empirically implausible to boot. The notion that paying someone to work for you is sharing your wealth with them obscures the fact that the employer would not employ if the value derived did not exceed that paid to the worker. Wealth concentrates in market systems over time. It does not dissipate, since it is a necessary condition for investment that there be a return on capital. The initial and prevailing distribution of wealth in a society has everything to do with the production and distribution of further wealth. When critics like Professor Dworkin suggest that there may be other values than wealth-maximization, such as distributive considerations, which are the law's proper concern,<sup>40</sup> for Posner to assert that these will all be solved "automatically" by the market once property rights have been distributed in accordance with his wealth-maximization criterion is to beg the question. Yet this is exactly what he does:

Once these [property] rights (to one's body, labor, and so forth) are established, they will be sold, rented, or bartered to yield income to their owners. In general, the wealthier people will be those who have the higher marginal products, whether because they work harder, or are smarter, or for whatever reason. In a system whose goal is to maximize society's wealth, the distribution of wealth that results from paying people in rough proportion to their

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37. *Id.* at 71.

38. Kronman, *Wealth Maximization*, *supra* note 15, at 240–42.

39. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 111–12.

40. Dworkin, *Is Wealth A Value?*, 9 *J. Legal Stud.* 191, 192–94 (1980).

contribution to that goal is not arbitrary. The main point, however, is that the specific distribution of *wealth* is a mere by-product of the distribution of *rights* that is itself derived from the wealth-maximization principle. A just distribution of wealth need not be posited.<sup>41</sup>

Passing over the fact that Posner never even attempts to establish that such a system does reward people in proportion with their contribution—if only because Posner endorses inherited wealth<sup>42</sup>—it is deeply misleading to refer to what is being maximized as “society’s” wealth. What, in fact, is being maximized is the wealth of those individuals who have the capacity to maximize wealth without reference to anyone else, except to the extent that they are instrumental in that goal. When Posner talks of wealth-maximization as producing a surplus “for the rest of us to enjoy,”<sup>43</sup> he is assuming a trickle-down causal theory for which no decisive evidence has ever been offered (nor is any offered here by Posner), for even in terms of the analytical logic behind the Pareto system, there is no necessary reason to believe that wealth-maximization by a given individual will have positive external effects on others.<sup>44</sup> For this reason—protestations by Posner to the contrary notwithstanding—there is no convincing sense in which wealth-maximization can be argued to respect individual autonomy.

In short, Posner dodges all distributive questions by definition and circular argument. This is why such critics as Dworkin, Kronman, and Leff<sup>45</sup> are justified in complaining that wealth-maximization cannot be the exclusive value guiding adjudication. To the extent that a court did follow Posner’s theory, it would be invoking one particular contestable causal theory of how wealth is maximized in fact, and endorsing whatever distributive externalities turn out to be generated by it. If one of these in a system which generates Trump Tower is a bag lady living out of a locker in Grand Central Station, so be it; it is a “mere by-product of the distribution of *rights* that is itself derived from the wealth-maximization principle.”<sup>46</sup> Posner’s defense of the market as a distributor of rights is arbitrary; it does not follow from his premises once he has admitted the existence of transaction costs and wealth effects, and it is incoherent as an account of the origins of property rights, since it presumes their existence. What Posner really wants judges to do is mimic or “shadow” the market, or what they believe would be generated by the market in a particular case where the market is malfunctioning. He believes that the distributive chips must lie where they fall. This is a distributive theory which Posner never defends, and, indeed, the very need to defend it is evaded by assuming that maximizing the wealth of those who already have it somehow benefits “society,” an empirical claim not supported by his theory and which he never seeks to establish.

41. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 81.

42. *Id.* at 82.

43. *Id.*

44. Strictly, all that is required is that no party be made worse off relative to his previous position, *i.e.*, in absolute terms, relative inequalities can grow continuously in an expanding economy.

45. Dworkin, *Is Wealth a Value*, 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth Maximization*, *supra* note 15; Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974).

46. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 1, at 81.

## II. WEALTH MAXIMIZATION AS JUDICIAL EFFICIENCY: THE MACROECONOMIC THEORY

Whatever the internal difficulties in the microeconomic logic of Posner's conception of efficiency as wealth-maximization, it is notable that once we move into the domains of Posner *qua* legal reformer and judge, the microeconomic theory is largely abandoned. This is not to say that the appeal to "law and economics" is ignored. In his prize-winning book on the crisis of overload in the federal courts, Posner contends that these courts "can improve their performance in common law adjudication by using some simple but powerful tools of economic analysis."<sup>47</sup> Economic analysis can, in his view, be used to improve the functioning of the federal courts in two quite different senses, the first having to do with legislative reform, and the second to do with an expansive interpretation of the nature of federal courts and their function as common law courts.

### A. *Economic Analysis and the Legislative Reform of the Federal Judicial System*

Posner's proposals for legislative reform of the courts are conceived of in terms of supply and demand. While he does not discount entirely the effects of such exogenous factors as demographic changes, his focus is on changes wrought by alterations in the structure of the system itself, and the effects of incentives of these changes on the behavior of litigants.<sup>48</sup> The explosive new demands on court time and resources in federal litigation, which he documents exhaustively,<sup>49</sup> are analyzed from the standpoint of supply and demand for judicial services. Viewing "federal judicial services as a product whose output, like that of other products, is governed by the laws of demand and supply,"<sup>50</sup> Posner sees the causes of these demands on the federal judiciary as coming from both directions. Demand has increased dramatically in diversity cases, for example, because the \$10,000 minimum amount in controversy requirement has not been changed since 1958 and has been eroded by more than two-thirds by inflation.<sup>51</sup> Other real declines in price which have stimulated demand have been the progressive relaxation of the elements of the justiciability requirement of Article III, notably mootness and standing.<sup>52</sup> Another major factor in decreasing the "pricing of judicial services" has been the greatly expanded availability of lawyers for indigent claimants, notably criminal defendants, through the combined result of Supreme Court decisions expanding the right to counsel in criminal cases, and the funding of lawyers for poor people through the Legal Services Corporation and the funding of lawyers for indigent federal criminal defendants under the Criminal Justice Act of 1964. "The fall in price of that input—from prohibitive to

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47. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 294.

48. *Id.* at 59–60, 77.

49. *Id.* at 59–166.

50. *Id.* at 77.

51. *Id.* at 78–79.

52. *Id.* at 79.

zero—for a large class of federal litigants is the economic equivalent of a dramatic drop in the price of the services themselves.”<sup>53</sup>

The other major factor in “shifting the demand curve for federal services outward” has been the the legislative and judicial creation of new federal rights since the early 1960s.<sup>54</sup> Title VII of the Civil Rights Act created many new remedies for employment discrimination, but more important than any single statute has been the Warren Court and, to a slightly lesser extent, the Burger Court which have, “through broad interpretations of the Bill of Rights, the due process and equal protection clauses of the fourteenth amendment, the Habeas Corpus Act of 1867, and section 1 of the Ku Klux Klan Act of 1871, and through willingness to create private rights of action under federal statutes and the Constitution itself . . . enormously enlarged the number of rights upon which a federal court suit [can] be founded.”<sup>55</sup> Posner estimates that these factors explain seventy-five percent of the 250 percent increase of filings in federal district courts between 1960 and 1983.<sup>56</sup> While the increase in federal appeals is more complex and difficult to explain, partly because of growing uncertainty over what is the law in a period of such massive, innovative change (which obviously stimulates appeals), the same variables have clearly had a major impact—notably in criminal appeals which have increased from twenty-five percent in 1960 to almost ninety-five percent in 1982.<sup>57</sup>

The consequence of this massive increase has been a corresponding decline in quality in the judicial process, for the conventional market mechanisms have failed to limit demand. In a private market “[i]n the short run, when (by definition) producers are unable to expand their productive capacity, price rises to ration demand to existing fixed supply” and in the longer run supply will respond by increasing. This has not happened regarding access to courts.<sup>58</sup> No attempt has been made to limit demand:

[W]ithout ever clearly acknowledging their policy, the people who control the federal court system (congressmen, executive branch officials, judges, and judicial administrators) have acted consistently over this [1960-83] period as if they had an unshakable commitment to accommodating any increase in the demand for federal judicial services without raising the price of those services, directly or indirectly, in the short run or the long run.<sup>59</sup>

While the evident political attractiveness of this approach is that it shifts the costs of dealing with the problem from vociferous interest groups to silent taxpayers and future litigants, even this policy has not been followed consistently. The number of federal district court judges has doubled while the caseload has tripled, the number of federal appeals court judges has doubled while appeals have increased eightfold, and, of course, the number of Supreme Court justices has remained constant. The inevitable resulting strain on the system has produced much greater reliance on

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53. *Id.*

54. *Id.* at 80.

55. *Id.* at 80-81 (citations omitted).

56. *Id.* at 87.

57. *Id.* at 91.

58. *Id.* at 94.

59. *Id.* at 95.

supporting personnel—law clerks, referees in bankruptcy, new federal magistrates operating as “kind of junior district judge[s],” “externs” (law students obtaining course credit away from law school), and staff attorneys.<sup>60</sup> The political costs to legislatures of raising expenditures above certain levels (now close to having been reached), together with the relatively fixed structure of the upper institutional echelons of the federal system, make these quality-diminishing results more or less inevitable,<sup>61</sup> and the only viable direction for reform in Posner’s view is to take steps to limit demand for federal judicial services.<sup>62</sup> This can be done by “upping the ante,” increasing filing fees, increasing the minimum amount-in-controversy in diversity cases and reinstating it in other cases, and generally requiring losing litigants in civil litigation to pay winners’ attorneys fees to reduce the taxpayer “subsidy” of federal civil litigation.<sup>63</sup> Congress might also limit or even abolish diversity jurisdiction,<sup>64</sup> and create new tiers of administrative review within the executive branch.<sup>65</sup> These steps would function to limit demand and to shift some of the irreducible burden to state courts which cannot close their doors since they are constitutionally required to hear federal claims.<sup>66</sup>

While some may quibble with aspects of Posner’s causal empirical claims, there can be little doubt that the picture he paints of the increase in demand for federal judicial resources over the past three decades is broadly accurate. For the purposes of this discussion I will assume that it is. While it is useful to have the costs of the creation and enforcement of a civilized system of federal rights unambiguously pointed out, the implicit theory of efficiency behind Posner’s recommendations is undefended and indefensible. What is that theory? What is the significance of the expansion of the caseload from the standpoint of legislative reform? I will consider this first from within the terms of Posner’s economic analysis, and then I will look more critically at the terms of that analysis themselves.

From the standpoint of Posner’s demand/supply model, there is, of course, no particular reason for the system not to expand over time. The fact that demand for a commodity increases partly because it becomes cheaper in no way distinguishes what Posner terms “federal judicial services” from any other commodity. To assume otherwise would be to embrace a theory of “natural prices” of the sort sought after by classical economists from Petty to Ricardo—precisely the kind of theory that the neoclassical economists axiomatically rejected. The classical view was that while supply and demand might have short term effects on price, in the long run they would determine output; market prices would always fluctuate around “natural” prices which, for Petty, Smith, Ricardo, and Marx, were determined by labor or the cost of

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60. *Id.* at 97.

61. *Id.* at 130–31.

62. *Id.* at 95–96.

63. *Id.* at 131–32.

64. *Id.* at 139–46.

65. *Id.* at 160–62. Posner also considers, but is less convinced of the merits of the creation of more specialized courts, particularly in such technical fields as antitrust, and a second tier of Supreme Court review. *Id.* at 147–60, 162–66.

66. *Id.* at 133.

labor time.<sup>67</sup> The marginalist concept of long-run equilibrium price on which neoclassical economics was founded dispensed with all notions of natural price, explaining movements in price as the sole consequence of interactions between demand and supply. From the standpoint of this theory, if it is really to be taken seriously as a model for analyzing the supply and demand for judicial services, it makes no sense to say that demand is too great and should be limited by the state. If legal rights are the commodity, supplied by the state as a natural monopoly, which assumption is required to get the entire argument off the ground,<sup>68</sup> then supply of judicial services will expand in response to increased demand, even when this increase is the partial result of previous increases in supply. And the mere fact that politicians resist funding that expansion is not necessarily an indication that the objective limits to supply have been reached. This is an empirical claim which is not especially plausible given the fact that the United States has lower rates of taxation than almost all capitalist nations and that federal expenditures as a proportion of GNP are likewise comparatively low.<sup>69</sup> Rather it is more likely to mean either that there is some market failure preventing supply from responding adequately to changes in demand, or perhaps more plausibly, that effective demand is satisfied, at least in the short term, by a greater quantity of lower quality services. If Posner's economic model is to be taken seriously, then no objective quality of services ought to be provided. If people demand services at a greater rate than they are prepared to tolerate increases in taxation, the result must necessarily be a decline in quality. But so what? And if, *per impossible*, Posner was able to make the case for an objective quality of service, resistance to the taxation increases necessary to finance those services at new levels of demand would still fail to show decisively that objective limits to supply had been reached. It could just as plausibly indicate the existence of free rider problems, of individuals hoping to get the benefit of better services while resisting to bear the proportionate cost. In that case there is no particular reason for preferring state action to limit demand over state action to force taxation increases to supply it. Indeed, in the face of this particular market failure, the doctrine of consumer sovereignty would seem to dictate the latter policy.

It is clear that, on its own, Posner's economic model is perfectly consistent with continuous increases in demand and supply, and, indeed, if we pressed the market metaphor to its logical extreme, we might even want to regard growth in "adjudicative output" as a measure of "macro-judicial" health. This is, of course, absurd, and is reminiscent of the psychologist who remarked that in the best of all possible worlds everyone would always be in therapy. But the reason why it is absurd is instructive: no economic theory of efficiency can function as a substitute for policy

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67. They differed greatly with one another over how these terms were to be defined and quantified. See M. DOBB, *THEORIES OF VALUE AND DISTRIBUTION SINCE ADAM SMITH* (1978).

68. If the economic model is to be taken seriously, this must be the logic for the reasons advanced by Robert Nozick. Unless coercive force is regarded as a natural monopoly, perhaps in principle evolving from mutual "protection associations" or insurance companies for the protection of individual rights, the logic of efficiency cannot justify the existence of any legal system at all. See R. NOZICK, *ANARCHY, STATE AND UTOPIA*, 113-119 (1974).

69. Cameron, *Does Government Cause Inflation: Taxes, Spending and Deficits*, in *THE POLITICS OF INFLATION AND ECONOMIC STAGNATION* 224-79 (L.N. Lindberg & C.S. Maier eds. 1985).

decisions about the purposes for which a legal system exists. Once these policy decisions are determined, economic reasoning may help us decide how to realize those policies most effectively and force us to face up to the costs of the rights we decide to create. But these are quite other matters. Economic theory cannot itself tell us how many rights to create and enforce, or what quality of enforcement is desirable; for the model to make any sense within its own terms, these things must be regarded as exogenous to it.

If this is true, the central issue becomes how these questions are to be decided. The traditional public law answer to this question, that they are the combined result of actions in the political branches and those of a common law making judiciary, gets Posner's qualified endorsement. But he interprets the traditional answer novelly to reinforce his appeal to economic theory. His account of common law making will concern me in the next subsection; for now I focus on his view of the legitimacy of the acts of the political branches.

The key question about legislative action for Posner has to be the sense in which it can be said to function in the public interest. From the standpoint of his economic theory, the existence of government is something that needs to be explained, ultimately, in terms of economies of scale and market failures. There is no room for a view of a public sector having intrinsic merit or value, or of it having an historical lineage independent of the private sector; the logic of all law is ultimately the logic of private law. Although some laws are based on appeal to "public sentiment" which "cannot easily be defended on the usual economic or utilitarian grounds,"<sup>70</sup> the two major functions of legislation having to do with market failure and the results of interest-group politics, can thus be explained. Of the first Posner remarks that the "oldest strand" in the theory of legislation is the "public interest" conception:

Well represented in the writings of such economists as Baumol and Pigou, and approximated by the traditional lawyer's view that legislation is designed to protect the public interest, implicitly defined in utilitarian terms, this conception asserts that both the ideal and for the most part the actual function of legislation is to increase economic welfare by correcting "market failures" such as crime and pollution.<sup>71</sup>

Passing over the facts that the idea that legislation functions in the public interest is many centuries older than either utilitarianism or welfare economics in Anglo-American jurisprudence and legal practice, and that for most of its history legislation has had very little to do with utilitarian purposes, it is clear that the "public interest" component of Posner's conception of the point of legislation has to do largely, if not exclusively, with problems of market failure: free riding and economies of scale provide the rationale. Posner is also much impressed by the interest group theory of legislation, and particularly more recent theories of log rolling and the triumph of small, powerful, single issue-oriented interest groups in legislative battles, so that this kind of legislation may be "systematically perverse from a public-interest standpoint

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70. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 266.

71. *Id.* at 262 (citations omitted).

by facilitating the redistribution of wealth from large groups to small ones.”<sup>72</sup> Like Holmes before him, Posner does not see the redistribution of wealth from large to small groups as a necessary demerit of legislation.<sup>73</sup> Although a complete theory of legislation would have to account for both “public interest” (in Posner’s sense) and interest group legislation, from Posner’s standpoint, analysis of the latter means that conventional conceptions of statutory construction in terms of legislative intent can often be highly misleading. “Courts do not have the research tools needed to uncover the motives behind legislation. Nor can they just presume the presence of an interest group somewhere behind the scenes.”<sup>74</sup> Sometimes there will be an interest group and the courts will be dealing with special interest legislation; at others times, there will be no interest group. Only in these latter circumstances do “the actual and the ostensible purposes” of the legislation coincide.<sup>75</sup> But this is the relatively rare case in which legislation rectifies market failure; for Posner there is no conception of the public interest other than this.

This unclear combination of public interest legislation and the effective voice of narrow interest groups in comprising statutory law is problematical for Posner’s demand/supply theory of judicial services. To the extent that statutory law really is simply the result of the battle of interest groups to get their way, and assuming that Posner is serious about his neo-Holmesian position that there is nothing wrong with this battle, Posner has no basis for his view that the rights created by such legislation as Title VII of the Civil Rights Act generate “too much” demand for judicial services. In this war of all against all, the appropriate level of demand must be functionally defined as whatever gets generated as a by-product of the machinations of the political process. To the extent, on the other hand, that law functions in the public interest, and this is understood to mean only market failure and its judicial analogues, then it is difficult to see how the demand/supply model can have any relevance at all, since we are, by definition, dealing with circumstances in which market mechanisms have broken down. In these circumstances, as I pointed out earlier, there is no particular reason to believe that limiting demand is an appropriate policy response, by legislatures or courts, and, indeed, there are good reasons for thinking that it is not.

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72. *Id.* at 264.

73. Holmes held that “[t]he more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest . . . . It is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that . . . . The fact is that legislation . . . is necessarily made by a means which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else.” *Herbert Spencer: Legislation and Empiricism*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 104, 107–09 (Shriver ed. 1936), *quoted in id.* at 264.

74. *Id.* at 267.

75. *Id.* at 267–68.



B. *Statutory Construction and Efficient Common Law Adjudication in the Federal Courts*

Posner's account of statutory construction is located in his broader theory of common law making. In its "macro-judicial" manifestations this theory rests on two premises: that there is a lot more federal common law than many of us realize and that the structure and evolution of this common law rests on and instantiates his micro-economic theory of wealth-maximization discussed in Part I above. It is through this lens that Posner perceives the realities of common law making and of statutory construction.

At least part of the first premise is not controversial today. Ever since Ronald Dworkin's seminal attack on legal positivism,<sup>76</sup> legal theorists have had to deal with the fact that both statute and precedent are frequently indeterminate, requiring one of several possible judicial constructions to supply determinate meaning. People differ greatly on how numerous and frequent the interpretative possibilities are, how big the gaps are, and how they are filled, but no one seriously denies that the gaps exist. What fills the gaps in Posner's view is common law, and in the federal system, federal common law. This is conceived of quite broadly:

[Not as] limited to the business of the royal courts of Westminster in the eighteenth century (the approximate sense in which "common law" is used in the Seventh Amendment and the Judiciary Act of 1789), but as encompassing all fields that have been shaped mainly by judges rather than legislators. Common law thus includes, among other fields, admiralty, equity, and modern federal civil procedure (the rules of which have been formulated under the direction of the Supreme Court justices), as well as torts, contracts, property, trusts, future interests, agency, remedies, and much of criminal law and procedure. . . . [M]any ostensibly statutory and constitutional fields really are common law fields.<sup>77</sup>

Posner does not want to expand the range of common law adjudication. Indeed, he is critical of such proposals as Calabresi's argument that common law courts should have the power to declare statutes obsolete, on the grounds that this would be a judicial usurpation of legislative authority.<sup>78</sup> But Posner does want to sustain the common law within what he sees as its proper limits, to protect it from displacement by the growth of statutory law, and to make it more robust and efficient.

In Posner's view, as soon as courts issue opinions they inevitably begin to make law. They do this for three reasons. First, common law arises by historical default. Until the mid-nineteenth century English and American legislatures concerned themselves primarily with revenue measures and local administration, so that the formulations of general rules of conduct, regulation of safety and health, trade and commerce, employment, inheritance, and internal security all came to be regulated by judge-made law, "common law" in Posner's nontechnical sense. This huge body

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76. R. DWORIN, *TAKING RIGHTS SERIOUSLY*, 14-130 (1978). Of course Dworkin was not the first to make this charge; it had been central to the arguments of many of the early legal realists. But in contemporary jurisprudential argument this view is most commonly associated with Dworkin.

77. POSNER, *THE FEDERAL COURTS*, *supra* note 5, 294.

78. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 34, 38 (1982), *cited in* POSNER, *THE FEDERAL COURTS*, *supra* note 5, 290-92.

of common law precedent was taken over more or less intact after the American Revolution, and its mere existence means that there is virtually no action a court can take without invoking, restating, and developing some aspect of it.<sup>79</sup> A second reason for the inevitable survival of common law in “the modern age of statutes” is generated by the need for specificity in judicial decisions. Legislators necessarily reason in general terms, without knowledge of the specific fact patterns to which their rules will be applied. “The judge has the advantage of seeing the rule in operation, and he can deal with problems of application the legislature did not foresee.”<sup>80</sup> This means that where there is “play in the joints” of legislative enactments, the judge can and must “refine the rule to make it a more apt instrument of the legislature’s purposes.”<sup>81</sup> This process of refinement is essentially a common law one. The third source of inevitable common law is structural and quite Calabresian, having to do with the different compositions of courts and legislatures. Legislatures are “large, representative bodies elected at frequent intervals in partisan elections . . . .”<sup>82</sup> As such they are frequently “handicapped in dealing effectively with technical questions, quite apart from the inherent limitations of foresight.”<sup>83</sup> The very “process of gaining agreement in a diverse, factious assembly results in compromises that are unclear and sometimes incoherent. . . .”<sup>84</sup> In fact, Posner highlights the differences in legislative and judicial rulemaking as follows:

[T]he built-in impediments to getting legislation passed—impediments designed to reduce the legislators’ power, to weed out proposed legislation that lacks real support, and to increase the stability of legislation once enacted—make it difficult for the legislature to withdraw or revise misconceived or poorly drafted legislation. In contrast, judges operate in a less political and (until recently) less hectic atmosphere which allows them to apply a measure of relatively disinterested repair to the sometimes badly damaged products of the legislative process.<sup>85</sup>

While Posner would limit this last form of common law making to interpretation of statutes (rather than confer an abolitionist power to treat them like judicial precedents),<sup>86</sup> a degree of common law making of this kind is also inevitable. In addition to this broad conception there are vast areas of the law which Posner defines as “quasi common law” because they “require the type of balancing of utilitarian values, of benefits and costs, that makes a field of law economic at its core.” Posner thus associates the term “common law” not only with “judge-created law but with law that is dominated by utilitarian, or in economic terms efficiency-maximizing, values.”<sup>87</sup> This includes, at least, aspects of antitrust, intellectual property, choice of laws, procedure, remedies, jurisdiction, constitutional law, and the law of attorneys’ fees.<sup>88</sup>

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79. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 4–5, 298–314.

80. *Id.* at 5.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 290–92.

86. *Id.* at 300–01.

87. *Id.* at 301.

88. *Id.* at 296. *See also id.* at 300–14.

Given this broad conception of the common law and this view of the common law functions of the federal courts, Posner is concerned to make them more efficient through the use of "some simple but powerful tools of economic analysis."<sup>89</sup> It is difficult, however, to discern a consistent economic logic underlying Posner's recommendations. On the one hand, at the outset of his discussion of common law adjudication in the federal appellate courts, Posner reaffirms his invisible-hand descriptive theory of micro-judicial efficiency—the "efficiency theory" of the common law or the idea that its evolution is "heavily influenced by a concern, more often intuitive than explicit to be sure, with promoting economic efficiency."<sup>90</sup> On the other hand, in several areas Posner does not affirm the kind of conservative traditionalism about the common law that this reasoning would lead one to expect. The most obvious of these areas is his discussion of the rules of statutory interpretation and construction.

Posner does not characterize himself as unconditionally in favor of judicial restraint; he endorses this doctrine only to the extent that it means respecting the separation of powers,<sup>91</sup> and even then he holds that it must sometimes give way to other rules of adjudication.<sup>92</sup> Judicial restraint cannot be "an adequate shorthand for good judging."<sup>93</sup> Many other things are involved: good legal research and logical analysis, "a sense of justice, a knowledge of the world, a lucid writing style, common sense, openness to colleagues' views, intelligence, fair-mindedness, realism, hard work, foresight, modesty, a gift for compromise, and a commitment to reason and relatedly to the avoidance of 'result-oriented' decisions. . . ."<sup>94</sup> By "result-oriented" Posner means the Tushnetian kind of approach designed to advance a particular political or ideological agenda.<sup>95</sup> Although Posner thinks it inevitable "that the judge's personal policy preferences or values play a role in the judicial process,"<sup>96</sup> principled decisions can still be distinguished from "result-oriented" ones: "a decision is principled if and only if the ground of decision can be stated truthfully in a form the judge could publicly avow without inviting virtually universal condemnation by professional opinion."<sup>97</sup> This reflects a kind of consensualized Kantian universality. Thus, while *Brown v. Board of Education*<sup>98</sup> was an "activist" decision, it was principled rather than result-oriented in Posner's sense.<sup>99</sup> There is thus a deep conservatism to Posner's jurisprudence in that it limits the values that can inform interpretation to those which are not greatly at odds with the values prevailing in the existing judicial community. So, for instance, while Holmes' decisions were

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89. *Id.* at 294.

90. *Id.* (citation omitted).

91. *Id.* at 207–20.

92. *Id.* at 220–22.

93. *Id.* at 220.

94. *Id.*

95. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981); POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 218–19.

96. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 218.

97. *Id.* at 205.

98. 347 U.S. 483 (1954).

99. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 220.

shaped by his commitment to social Darwinism, our assessment of him as a judge should not depend on whether or not we think social Darwinism good or bad, “so long as we do not think it childish, vicious, idiosyncratic, or partisan in the sense in which his adopting the Democratic or Republican campaign platform of 1900 as his judicial *vade mecum* would have been partisan and therefore unprincipled, result-oriented.”<sup>100</sup> Thus, while “[t]he element of will, of personal policy preference, is inescapable in the American judicial process,” the

willful judge, the judge who makes will the dominant element of his decision making, is properly reprobated. Moreover, a preference may be too personal to be a legitimate ingredient of the judicial process. It is one thing for the judge to give expression to the big ideas of his age, and to recognize that they need not be—in our society, are unlikely to be—ideas that command universal support. But if they are idiosyncratic, the judge has no business using them to decide cases. That would make the law too quirky and unpredictable.<sup>101</sup>

Passing over the great difficulties of whether there is the kind of agreement on the “big ideas” that Posner postulates, there remain the further difficulties of by what criteria this alleged agreement is to be identified, by whom, and why majority values should, in any case, dominate interpretations by judges who are (at least in part) charged with preserving counter-majoritarian rights and values. All this leaves the specifics of interpretation and statutory construction untouched. It is when Posner tackles these issues that he undermines his own theory of “micro-judicial” efficiency.

Consider, for instance, Posner’s analysis of canons of construction. By canons of construction Posner denotes the “list of ancient interpretive maxims catalogued in such works as *Sutherland on Statutory Construction* and invoked with great frequency by federal [judges] as by state judges in dealing with questions of statutory interpretation.”<sup>102</sup> Thus, whether or not they are technically common law maxims, the canons of construction are certainly part of the common law in Posner’s sense. “A realistic understanding of legislation,” he tells us, is “devastating to the canons of construction.”<sup>103</sup> While Posner does not go as far as Llewellyn, who held that for every canon one might bring to bear on a point there is an equal and opposite canon,<sup>104</sup> Posner does argue that “with a few exceptions, they [canons] have no value even as flexible guideposts or rebuttable presumptions, even when taken one by one, because they rest on wholly unrealistic conceptions of the legislative process.”<sup>105</sup> The plain meaning rule, for instance, which requires that interpretation should begin with the words of the relevant statute, does not adequately describe what judges

100. *Id.* at 221–22.

101. *Id.* at 222.

102. *Id.* at 276 (citations omitted).

103. *Id.*

104. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521–35 (1960); POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 276.

105. *Id.* at 277.

typically do; they start with "some conception of its subject matter" and the case law, and they "may never return to the statutory language."<sup>106</sup>

A second canon, that "remedial statutes are to be construed broadly,"<sup>107</sup> is deficient because its rationale makes assumptions which we now know to be false about legislative processes. The idea that remedial statutes should be construed broadly rests on the notion that the legislature was trying to remedy an ill, and it would therefore want its legislation to be construed so as to make it more rather than less effective. But, Posner tells us, the scientific study of legislatures has taught us that there is rarely consensus behind legislation, that it comes about as a result of compromises and log rolling. If a remedial statute is the result of "a compromise between one group of legislators that has a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody."<sup>108</sup> Nor can post-enactment legislative materials resolve this question, for "[t]o give effect to the current legislator[s'] preferences is to risk spoiling the deal cut by the earlier legislators—to risk repealing legislation, in whole or in part, without going through the constitutionally prescribed processes for repeal."<sup>109</sup>

A third unrealistic canon is

that courts should give great weight to the interpretation of a statute by the administrative agency that enforces it. There is no reason to expect administrative agency members, appointed long after the legislation they enforce was enacted, to display special fidelity to the original intent of the legislation rather than to the current policies of the Administration and the Congress.<sup>110</sup>

Other examples, such as the canons that every word in a statute must be given significance and that repeals by implication are to be disfavored, make unrealistic assumptions about the "omniscience" of Congress. In fact, Posner tells us words are often "tossed in" to statutes, or vague words are employed to cover over compromises, and legislation is often passed without knowledge of its implications for existing legislation.<sup>111</sup> The same is true with the canon *expressio unius est exclusio alterius* and with the canon that reenactment without a change of a statute that courts have interpreted in a particular way is evidence that Congress has adopted that construction. Often legislators will not have thought of alternative formulations and will not know of prevailing statutory interpretations in the courts.<sup>112</sup>

A few canons survive Posner's scientific scrutiny and have "arguable merit."<sup>113</sup> The canon that penal statutes should be construed narrowly is defensible on the grounds that all penal statutes overdeter to some degree, so that the "appropriate level of care" in drafting them is higher. If the legislature can be assumed to observe this

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106. *Id.* at 278.

107. *Id.* at 278.

108. *Id.* at 278–79.

109. *Id.* at 279.

110. *Id.* at 280 (citations omitted).

111. *Id.* at 278–80.

112. *Id.* at 282–83.

113. *Id.* at 283.

higher level, “then courts that construe criminal statutes more narrowly than they construe civil statutes (as they do) do not run a serious risk of disserving the legislative will through underdeterrence.”<sup>114</sup> The canon that statutes should be construed, where possible, to avoid raising constitutional questions can also be defended, because it avoids unnecessary constitutional decision, although the process of that avoidance generates problems of its own.<sup>115</sup> In short, with these few exceptions:

[B]y making statutory interpretation seem mechanical rather than creative, the canons conceal the extent to which the judge is making new law in the guise of interpreting a statute. The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act willfully than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of Congress.<sup>116</sup>

In place of this pseudo-formalism, which supplies a misleading gloss of logical deduction to the process of statutory interpretation, Posner proposes that judges engage in “imaginative reconstruction” of statutes; the judge should first “put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.”<sup>117</sup> If this turns out not to be possible, as it “occasionally” will because of lack of information or because legislators failed to agree on “essential premises, then the judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand.”<sup>118</sup> In this circumstance he must remember “that what seems reasonable to him may differ from the legislators’ conceptions of reasonableness, and that the latter must govern as far as possible. Even with old statutes, the judge’s job “is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.”<sup>119</sup>

There are four major difficulties with Posner’s account that are of interest. First, there is an ad hoc quality to his differing evaluations of the different canons which produces internally inconsistent results. Why, for instance, should we assume that legislators do in fact draft penal statutes with a higher standard of care than other statutes? Why should we imagine that a penal statute is any less the product of compromise and log rolling which make it impossible to discern whether or not the statute overdeters or underdeters? Why are not all the difficulties of assuming legislative agreement and omniscience just as severe in these circumstances as in others? If Posner’s objections to the canons are to be taken seriously, it is highly implausible on its face that a certain class of statutes can be singled out and regarded as exempt from these difficulties. Second, and more serious, the major difficulties

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114. *Id.* (citation omitted).

115. *Id.* at 284–85.

116. *Id.* at 285–86.

117. *Id.* at 286–87.

118. *Id.* at 287.

119. *Id.*

Posner identifies with the canons of construction attend his own account of "creative reconstruction" of legislative intent. If statutes resulted from compromises which make it impossible to discern clearly what the legislators intended, how is a judge better placed to speculate on what those same compromising legislators would, collectively, have intended in the application of their statute to future fact patterns which they had not envisaged? How is he better placed to speculate about what those same legislators would, collectively, have regarded as reasonable in these unencountered circumstances? Likewise, to the extent that canons assume too much omniscience by legislators, this problem is only compounded when we add the speculative element of Posner's theory of "imaginative reconstruction." How ignorant or well informed do we decide they would have become about the collateral consequences of their legislation? Posner acknowledges that his approach "invites the criticism that judges do not have the requisite imagination and that what they will do in practice"<sup>120</sup> is vote their own preferences, ascribing them to legislators. Yet his reply is entirely unsatisfactory: "the irresponsible judge will twist any approach to yield the outcome that he desires, and the stupid judge will do the same thing unconsciously."<sup>121</sup> If this is true, Posner's approach still provides no basis for preferring his approach to the traditional one; it does not go to the problem that "imaginative reconstruction" compounds the defects he identifies in the canons of construction. One suspects that the real motive behind the theory of imaginative reconstruction is that the theory will make it easier for judges to attribute Posner's theory of wealth-maximization to legislators' purposes when there is no evidence for this in the legislation. For instance, in interpreting the Federal Mine Safety and Health Act in *Miller v. Federal Mine Safety and Health Review Commission*,<sup>122</sup> Posner, writing for the court, was confronted with the problem of deciding when, if at all, an unclear part of the Act entitles a worker to walk off the job (rather than complain) if he believes there to be a safety hazard. Posner reasoned that a complaint by a worker does not disrupt the operations of the mine, so that even frivolous complaints impose few costs on the employer.<sup>123</sup> A work stoppage, on the other hand, is invariably a source of significant cost. "Thinking our way as best we can into the minds of the Senators and Representatives," he continued reconstructively, "we can imagine them wanting to allow miners to complain freely about the conditions of safety and health in the mine without having to worry about retaliation. . . . We are unwilling to impress on a statute that does not explicitly entitle miners to stop work a construction that would make it impossible to maintain discipline in the mines."<sup>124</sup> Of course Posner has no way of knowing that maintaining "discipline" in the mines had anything to do with the legislators' purposes, but if they are imagined to be wealth maximizers in his sense, then this goal can "imaginatively" be attributed to them.

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120. *Id.*

121. *Id.*

122. 687 F.2d 194 (7th Cir. 1982).

123. *Id.* at 196.

124. *Id.* at 196.

The third difficulty is more serious still: if Posner's discussion of the defects of the canons is accepted, it seriously undermines his theory of "micro-judicial" efficiency, and particularly the claim that the common law (as he broadly conceives it) is efficient. If the canons are part of the common law in his sense, which they must be, then the mere fact that they have evolved entails, presumably, that they serve some efficient purpose, else they would not have evolved. And for Posner to hold that they should be jettisoned, lock, stock, and barrel, in favor of his new approach based on "imaginative reconstruction" violates the whole gradualist ideal of common law making. Indeed, protestations to the contrary notwithstanding, the major premise behind Posner's account smacks much more of old-fashioned legal realism than of any attempt to revivify the common law tradition. How else are we to interpret the claim that the canons make "unrealistic" assumptions about how legislatures operate, and the argument that political scientists' theories of legislatures tell us that there is no unambiguous thing called legislative intent? These, as well as Posner's prescriptions, assume that if common law rules can be shown by "realistic" policy sciences to be based on muddles, they should be jettisoned for more "scientific" principles of statutory construction. Whatever the merits of this view, it is obviously inconsistent with the claim that the common law is naturally efficient, at least in the absence of a teleological conception of history (in terms of which Posner's new proposed stage in the history of the common law of statutory reconstruction would be a step on the way to perfect efficiency). But Posner does not begin to articulate such a conception.

In what may be an attempt to undermine the force of this criticism, Posner intimates in a footnote that his concept of "imaginative reconstruction" is not new, and is in fact traceable at least to Blackstone's *Commentaries*.<sup>125</sup> But if this line of argument was to be developed into a claim to the effect that this theory of imaginative reconstruction has long been a part of the common law, this would raise the further difficulty that two conflicting modes of statutory interpretation are both part of the common law, which in turn further undermines the claim that the theory generates determinate and "efficient" results.

This also raises the final and most serious difficulty, which is that if the common law is conceived of as broadly as Posner conceives it, it is hard to see how economic efficiency can have much to do with its reform. Quite apart from the analytical point that if the thesis were true the common law would not be in need of reform, Posner's discussion of the merits of economic reasoning in substantive areas of federal common law bears no obvious relationship to the "micro" theory and does not begin to generate determinate results. Posner reifies controversial empirical economic theories by writing always in universalist terms, referring to *the* theory of efficiency when there are many conflicting theories, to "economic analysis" when there are invariably many economic analyses, by comparing the enterprise of "law and economics" to astronomy "[w]ithout meaning to wrap myself in the prestige of the

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125. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 287 n.64.



physical sciences,"<sup>126</sup> thus supplying pseudoscientific garb to what are in fact empirically contentious and invariably controversial assertions.

I argued in Part I that this assertion was true even of his micro-judicial theory; it is far more obviously true once economic theories are applied to the actual world. For instance, when Posner describes "quasi common law" fields as those which require "balancing of utilitarian values,"<sup>127</sup> he fails to note that this does not itself tell us what the weights should be. Consider some of his own examples. As one instance of "virtually an explicit economic test" in the quasi common law field of procedural due process, he refers (without discussion) to the Supreme Court's "balancing test" announced in *Mathews v. Eldridge*,<sup>128</sup> to determine how many procedural safeguards must be provided before a person can be deprived of a property right by the government. But what is the *Mathews v. Eldridge* test? It states that in deciding how much process is due in these circumstances it is necessary to take the following factors into account:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>129</sup>

In that case the Supreme Court employed the test and reached the conclusion that disability benefits could be terminated by an administrative agency without an evidentiary hearing. In a subsequent decision the Court followed the test to the conclusion that an indigent mother could have her maternal rights terminated without the assistance of court-appointed counsel to assist her at the termination hearing.<sup>130</sup> Yet it is difficult to see how the "economic" component of this test bears decisively on the result in either case. What is critical is the value assigned to the initial rights to begin with, and the weight attributed to the state interest—whether it is "compelling" or merely "legitimate." These are constitutional questions, not economic ones, and as Justice Blackmun's dissent in *Lassiter v. Department of Social Services*<sup>131</sup> makes plain, if they are weighted differently the test will produce different results.<sup>132</sup> The test itself does not resolve the difficult constitutional decision about those weights; in fact it really does no more than make explicit that some weighting of costs and benefits of enforcing rights is unavoidable in constitutional adjudication—it tells a judge neither which rights are fundamental nor which should be. To say that this is an instance of the quasi common law of procedural due process "dominated by economic issues"<sup>133</sup> is to make an awful lot of theoretical hullabaloo about very little. Moreover, it is misleading when placed in the context of a

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126. Posner, *Some Uses and Abuses*, *supra* note 1, at 294.

127. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 300.

128. 424 U.S. 319 (1976), *cited in* POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 311.

129. 424 U.S. 319, 335 (1976).

130. *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

131. 452 U.S. 18 (1981).

132. *Id.* at 35–59.

133. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 310.

discussion of how a few “simple but powerful tools of economic analysis”<sup>134</sup> can improve the functioning of the federal courts, for it creates the impression that economic analysis can resolve questions which it cannot.

The same is true of Posner’s discussion of the “marketplace of ideas” metaphor in terms of which the Supreme Court deals with first amendment questions. This “can be analyzed by the same tools that economists use to analyze conventional markets”;<sup>135</sup> the “economic character” of the first amendment can be brought out when we restate it by saying that the government “may not limit competition in ideas.”<sup>136</sup> Whether or not it was true, as Holmes claimed in *Abrams v. United States*,<sup>137</sup> that it is “the theory of our Constitution” that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”<sup>138</sup> Posner is certainly correct that this interpretation has since dominated Supreme Court analysis of the first amendment in many areas, ranging from incitement, defamation and obscenity through the regulation of the media, commercial speech, political speech, and the relationship between money and speech. But it is quite wrong to think that “economic analysis” can resolve the major differences that dominate discussion in these areas, as can be seen by taking a closer look at the recent history of the Court’s view of the relationship between money and speech.

Although the Supreme Court is sharply divided on the capacity of the government’s ability legitimately to regulate the expenditure of money which is instrumental in propagating speech, in a long per curiam decision in *Buckley v. Valeo*,<sup>139</sup> the Court held that the only legitimate state interest in regulating the use of money to expound political ideas was to prevent corruption or the appearance of it, and the Court narrowly interpreted corruption to mean bribery. This reasoning led the Court to distinguish campaign contributions from expenditures by individuals, corporations and political action committees, and to hold that only the former might legitimately be regulated by Congress. The latter could not be regulated by government under any circumstances. The Court and several concurring opinions explicitly rejected as “wholly foreign to the First Amendment” the argument that government has any interest in or responsibility for equalizing access in public debate or in equalizing the volume of political speech, and insisted affirmatively that the first amendment is best served when the quantity and sources of political speech are wholly unregulated by government:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.<sup>140</sup>

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134. *Id.* at 294.

135. *Id.* at 311.

136. POSNER, *ECONOMIC ANALYSIS*, *supra* note 1, at 541.

137. 250 U.S. 616 (1919).

138. *Id.* at 630.

139. 424 U.S. 1 (1976).

140. *Id.* at 19 (citations omitted).

Although some Justices rejected the majority's distinction between contributions and expenditures as without constitutional significance,<sup>141</sup> all accepted the appropriate terms of analysis as fixed by the metaphor of the marketplace of ideas. And when the Court came to extend this holding to corporate expenditures in referenda three years later in *First National Bank of Boston v. Bellotti*,<sup>142</sup> by holding that a corporation is a person for purposes of the first amendment, the same terms of discussion formed the common ground between adherents of the Opinion of the Court and the dissenters. The disagreements focused not on the desirability of the marketplace analysis, but rather on competing causal theories of how that marketplace actually operates. Thus, Justice Powell, writing for the majority, explicitly rejected the argument that a Massachusetts statute limiting corporate expenditures should be upheld on the grounds that "corporations are wealthy and powerful and their views may drown out other points of view" because no such explicit finding had been made in the courts below.<sup>143</sup> The Court, thus, implicitly endorsed the neoclassical *laissez-faire* view it had taken in *Buckley*, that absent a specific showing of reasons to the contrary, it should be assumed that this market is naturally well-functioning and works to the benefit of all, or at least to the detriment of none, by improving the "quantity of expression" on public issues and the "depth of their exploration."<sup>144</sup> Of course, this is just one particular contentious theory of how such markets operate; it could be argued on the basis of the British experience that highly regulated forums of public discussion during election campaigns result in a considerably higher quality of discussion, and "exploration" of considerably greater "depth." Yet by reifying the neoclassical theory and placing the burden of proof in particular cases on those who would question it, the Court rationalizes striking down all restrictions on corporate expenditures to influence referenda in the name of *laissez-faire* capitalism. Since corruption of the political process was narrowly construed as bribery of public officials or the appearance of it in *Buckley*, the *Bellotti* Court never had to confront the question of corruption, as referenda do not directly involve public officials. The question whether vast expenditures of wealth can themselves corrupt the democratic process in this context could, therefore, not arise.

The dissenters in *Bellotti* adopted a competing market theory. Justice White, writing also for Justices Brennan and Marshall, acknowledged that *Buckley* had foreclosed the argument that the state has an interest in equalizing access to the forum of political speech, but adopted a different and more minimalist antitrust theory. "It has long been recognized," he argued, "that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."<sup>145</sup> For this reason the state of Massachusetts did

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141. Burger and Blackmun held that neither may be regulated and White, later joined by Marshall in dissent in *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), held that both may be regulated.

142. 435 U.S. 765 (1978).

143. *Id.* at 789.

144. 424 U.S. 1, 19 (1976).

145. 435 U.S. 765, 809 (1978).

have a legitimate interest in "preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . ." <sup>146</sup>

The Court's disagreements about the regulation of contributions and expenditures during elections since *Bellotti* have revolved around these competing theories of the workings of the market in political speech. A majority continues to stand behind the neoclassical *laissez-faire* theory, which was reinforced in *Federal Election Commission v. NCPAC*<sup>147</sup> in 1985. There the Court held it an unconstitutional limitation on political speech for Congress to limit expenditures of political action committees on behalf of candidates as a condition for those candidates to receive public funds during election campaigns.<sup>148</sup> The Court explicitly invoked the neo-classical reasoning of *Buckley* and reaffirmed its narrow definition of corruption.<sup>149</sup> The dissenters continue to emphasize that money is not itself speech and to affirm some version of the antitrust theory, although they may have different (more or less egalitarian) views of what the implicit "distributive" standard should be. While the equality of access, neo-classical, and various antitrust models have figured most prominently in the Court's discussions of money and political speech, there are other theories invoked implicitly at times. For instance, it might be argued that the exception in *Buckley* from disclosure requirements for minor and unpopular parties (reaffirmed in *Brown v. Socialist Workers '74 Campaign Committee*)<sup>150</sup> presupposes a kind of "infant industry" theory of the marketplace in political speech.<sup>151</sup>

Thus even in areas where courts explicitly invoke economic terminology and modes of analysis, it is quite misleading to suggest as Posner does that this in itself resolves constitutional and other normative disagreements; it merely generates a vocabulary in terms of which those disagreements are cast and sets some wide limits to discussion. For every economic theory there is a competing one, embodying different normative premises and purposes, and it is typically the premises and purposes which are in contention; no amount of "economic analysis" should be permitted to obscure this.

### III. ECONOMIC THEORY AND ADJUDICATION

In what remains of this Article, my concern will be to look at Posner the judge, to see how he makes use of economic reasoning in his activities on the federal bench. My central concerns will be to show first that he does not adhere consistently to his own "economic" principles, and second that when he does invoke substantive economic theories they are invariably controversial and ideologically loaded.

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146. *Id.*

147. 470 U.S. 480 (1985).

148. *Id.* at 493-94.

149. *Id.* at 496-97.

150. 459 U.S. 87 (1982).

151. 424 U.S. 1, 58-74 (1976). *See also* Rehnquist, dissenting in part, at 424 U.S. at 290-94, rejecting this view.

What are the principles of efficient adjudication that we should expect to find Posner attempting to put into practice as an appellate court judge? Some of these, at least, are spelled out explicitly in his account of the crisis of the federal courts. He argues that there should be "a rededication by federal judges to the principles of judicial self-restraint and institutional responsibility, the latter implying such specific reforms as greater brevity in opinions, a greater willingness to impose sanctions on parties (and their lawyers) who abuse federal judicial processes, a modest shift from loose, multifactor standards to precise rules, a reduction in the number of concurring opinions, and rules of intercircuit deference. . . ." <sup>152</sup> There should also be an "expansion of appellate capacity within federal administrative agencies such as the National Labor Relations Board (NLRB) and the Social Security Administration," among other reforms. <sup>153</sup> Leaving aside, for now, the issue of how much "economic analysis" is really behind these proposals—beyond the trivial claim that resources should not be wasted—how consistently does Posner try to advance them as a judge?

I examine Posner's decisions in two areas, labor and antitrust law. <sup>154</sup> These are both fields that have substantial common law components (in Posner's sense) and they are both fields that Posner regards as traditionally economic. They are at the core, therefore, of the domain in which he alleges economic analysis to be most obviously helpful. If the theory is discredited here in its own castle, we can forget the periphery of outbuildings and other dependencies beyond the moat; the theory of efficiency, as a basis for adjudication, will decisively have been laid to rest.

#### A. *The Labor Law Decisions*

Labor law is one of Posner's federal common law areas. It is interesting from our standpoint for procedural and substantive reasons. Procedurally, the existence of federal legislation and administrative agencies for at least part of its implementation allows us to test Posner's claims about judicial deference, to see how serious he is about husbanding judicial resources, judicial self-restraint, and deferring to cheaper, nonjudicial forms of dispute resolution such as those practiced by the NLRB. Even under existing law, Posner notes, the decisions of administrative law judges in labor cases as reviewed by the NLRB are due "as much and maybe more deference" than decisions of district courts, and he argues that this cheaper form of dispute resolution should be enhanced. <sup>155</sup> Substantively, labor law is illuminating because it is an area where allegedly scientific principles of economic analysis can be manipulated in the service of particular interests, so we can see clearly what use of substantive economic theories by judges in labor disputes amounts to in practice.

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152. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 319.

153. *Id.*

154. The samples of cases discussed below were obtained through computer searches on LEXIS and WESTLAW. In some instances, where labor relations and antitrust issues are presented in cases dealt with primarily on other grounds, the samples may not be exhaustive. Cases made available after October 30, 1987 will not appear in the samples.

155. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 161.

Between 1982 and September 1987, one hundred cases having to do with labor relations came before Posner on the Seventh Circuit. Fifty-seven of these involved appeals of decisions made by arbitrators or administrative agencies, and these will be our central concern here.<sup>156</sup> Posner wrote opinions, concurrences or dissents in

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156. There were forty-three labor relations cases not involving an arbitrator or administrative agency in which Posner either wrote or joined the opinion of the majority, or wrote a dissent. Four of these involved disputes exclusively between workers and unions. In *Grant v. Chicago Truck Drivers*, 806 F.2d 114 (7th Cir. 1986), the court upheld a summary judgment in favor of a union when members had alleged that failure to hold general membership meetings violates the Labor Management and Reporting Act. In *Vallone v. Local 705, Int'l Bhd. of Teamsters*, 755 F.2d 520 (7th Cir. 1985), in a *per curiam* opinion, the court affirmed a district judge's summary judgment against union members who had sued the union alleging breach of its duty of fair representation on the grounds that the statute of limitations had expired. In *Lewis v. Local 100, Laborers' Int'l Union*, 750 F.2d 1368 (7th Cir. 1984), the court affirmed that part of a district judge's holding that a union member's complaint claiming malicious refusal to refer him out of a hiring hall on preemption grounds, but reversed and remanded it insofar as it dismissed his breach of contract claims and held that he had to exhaust intraunion remedies before proceeding. In *Allen v. United Mine Workers 1979 Benefit Plan & Trust*, 726 F.2d 352 (7th Cir. 1984), Posner, writing for the court, upheld a district judge's summary dismissal of a complaint by a coal miner and his wife alleging that the trustees of the union employee benefit trust had breached their fiduciary duty to them by refusing to pay medical expenses when the wife had a baby. A fifth decision, *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983), dealt with a union's health and welfare trustees and its insurers for breaches of contract and fiduciary duties. A sixth case, *Tyson v. International Bhd. of Teamsters, Local 710 Pension Fund*, 811 F.2d 1145 (7th Cir. 1987) involved a suit by a former employee against the union pension fund under ERISA. A seventh case, *Williams, McCarthy, Kinley, Rudy & Picha v. Northwestern Nat'l Ins. Group*, 750 F.2d 619 (7th Cir. 1984), dealt with attorneys' fees, as did *Sonicraft, Inc. v. NLRB*, 814 F.2d 385 (7th Cir. 1987). *Robbins v. B & B Lines*, No. 86-1863 (7th Cir. Sept. 7, 1987) dealt with the rules covering employer participation in a pension fund, and *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) involved a dispute between participants in a pension fund and its trustees. *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577 (7th Cir. 1987) dealt with the extent-of-damages in a violation of the Equal Pay Act claim. The remaining cases were disposed of as follows.

*Affirmances of district court decisions in which a worker or union had been unsuccessful in a dispute in whole or part against an employer:* In *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173 (7th Cir. 1987), Posner, writing for the court, affirmed a district court dismissal of a complaint charging violations of overtime provisions of the Fair Labor Standards Act where percentage service charges compensating banquet waiters precluded payment of overtime. In *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987), Posner, writing for the majority, affirmed a district court's refusal to set aside a public law board's rejection of an employee's claim that his firing for marijuana possession violated the collective bargaining agreement between his union and the railroad. In *Shrock v. Altru Nurses Registry*, 810 F.2d 658 (7th Cir. 1987), Posner, for the majority, held that a nurse referral agency was not an employer, an employment agency, or a union as defined by Title VII and was therefore not liable for employment discrimination. In *Brotherhood of R.R. Signalmen v. Burlington*, No. 86-2602 (7th Cir. Sept. 15, 1987), the court affirmed a district judge's dismissal of a union's claim that a request that workers take a polygraph involves a major dispute within the meaning of the Railway Labor Act. In *Lingle v. Norge*, 823 F.2d 1031 (7th Cir. 1987), the Court upheld a district judge's holding that suits for retaliatory discharge were preempted by the Labor Management Relations Act. In *Woolridge v. National R.R. Passenger Corp.*, 800 F.2d 647 (7th Cir. 1986), the court affirmed a district judge's dismissal of a suit against a former employer because the employee's claim was within the exclusive jurisdiction of the National Railway Adjustment Board. In *Graf v. Elgin, Joliet E. Ry.*, 790 F.2d 1341 (7th Cir. 1986), Posner, writing for the court, affirmed a district judge's decision that a complaint by an employee that he was fired in retaliation for filing a suit against the railroad under the Federal Employer's Liability Act was preempted by the Railway Labor Act. In *EEOC v. United Air Lines, Inc.* 755 F.2d 94 (7th Cir. 1985), Posner, writing for the court, affirmed a dismissal of a complaint by a district judge when the Equal Employment Opportunity Commission alleged, on behalf of workers, a violation of the Age Discrimination in Employment Act. In *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied* 106 S.Ct. 1266 (1986), the court affirmed a district judge's dismissal of a complaint alleging tortious termination of employment and defamation on the grounds that the employee's claim depended on the terms of a collective bargaining agreement, was therefore covered by the Labor-Management Relations Act, and that federal law obligated him to exhaust his contract remedies before bringing suit. In *Sheetmetal Workers Union, Local 110 v. Public Serv. Co.*, 771 F.2d 1071 (7th Cir. 1985), the court affirmed a district judge's dismissal of a complaint by an employee and a union against an employer on the ground that the employer was not bound by the arbitration provisions of a project agreement. In *Flores v. Levy Co.*, 757 F.2d 806 (7th Cir. 1985), the court affirmed a district judge's dismissal as untimely an action by several employees against a union and employer on the grounds that the statute of limitations for filing a grievance had run. In *Bartholomew v. United States*, 740 F.2d 526 (7th Cir. 1984), the court affirmed a decision by a district judge holding that a worker's discharge from the postal service had been procedurally adequate in part because when he had been reinstated after an initial discharge he was once again subject to the 90-day probationary period. In *McCluney v. Joseph Schlitz Brewing Co.*, 728 F.2d 924 (7th Cir. 1984), the court upheld a district judge's finding that an employee alleging discriminatory

discharge under Title VII of the Civil Rights Act had the burden of proof, which he did not meet, of showing that the employer's discriminatory policy caused his discharge. In *In re Chicago, M., S.P. & P.R. Co.*, 713 F.2d 274 (7th Cir. 1983), *cert. denied sub. nom. Railway Labor Executives' Ass'n v. Ogilvie*, 465 U.S. 1100 (1984), Posner, writing for the court, affirmed a district court holding that *inter alia*, the Milwaukee Railroad Reconstruction Act requires deferral of statutory benefits until the end of the reorganization proceedings, and that the union, having taken advantage of part of the Act to the extent of obtaining millions of dollars in labor-protection benefits for its members, could not in the same proceeding challenge the constitutionality of the Act. In *Mohr v. Metro E. Mfg. Co.*, 711 F.2d 69 (7th Cir. 1983), Posner, writing for the court, affirmed a district judge's dismissal of a complaint against a company and unions by a schoolboy who was paid minimum wage to do janitorial work. His claim that he was entitled to union wages was held not to be covered by the collective bargaining agreement. In *EEOC v. Mercy Hosp.*, 709 F.2d 1195 (7th Cir. 1983), the court affirmed a district judge's dismissal of a "comparable worth" claim by female custodial workers, holding that it was not reversible error for the judge to conduct "hands-on" observation of custodial equipment without a court reporter present, to determine whether or not the work of the female employees was heavier than that of male employees. In *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983), Posner, writing for the court, affirmed a district judge's dismissal of a complaint by an employee against his employer alleging breach of a collective bargaining agreement. The alleged fact that the union poorly represented the employee at a grievance hearing did not amount to bad faith, the duty of fair representation was not breached, and consequently an action against the employer for breach of contract did not lie. In *Graf v. Elgin, Joliet & E. Ry.*, 697 F.2d 771 (7th Cir. 1983), Posner, writing for the majority, substantially affirmed a district judge's dismissal of a complaint by a worker against a union and employer. The court held that unless a union deliberately and unjustifiably refuses to represent a worker's grievance it cannot be guilty of unfair representation, but that the worker may prosecute his grievance on his own. In *Cote v. Eagle Stores, Inc.*, 688 F.2d 32 (7th Cir. 1982), *cert. denied*, 459 U.S. 1218 (1983), the court affirmed a district judge's dismissal of a complaint by an employee alleging that a union had breached its duty of fair representation and that the employer had violated the collective bargaining agreement. Since the action against the union failed, the action against the employer must fail.

*Affirmances of district court decisions in which a worker or union had been successful in a dispute in whole or in part against an employer:* In *United Steelworkers v. Aurora Equip. Co.*, 56 U.S.L.W. 2193 (7th Cir. Sept. 24, 1987), the court dismissed as premature an appeal of a district judge's remand of a case to an arbitrator. In *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987), the court upheld a jury award for invasion of privacy in a suit by an employee and his wife against his employer. In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), Posner, writing for the court, affirmed a decision holding that a black employee was a victim of employment discrimination and harassment, and, thus, was entitled to compensatory and punitive damage awards. In *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13 (7th Cir. 1985), Posner, for the court, upheld a district judge's denial of a stay of his order to a company to go to arbitration pending appeal, on the ground that the company did not show that it would suffer irreparable harm if the stay was denied. In *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 1602 (1987), Posner, writing for the court, upheld a damages award to a worker by a district court on the grounds that the employer was liable for its supervisor's misconduct and that the Railway Labor Act does not supersede The Federal Employer's Liability Act in all circumstances. In *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local 103 v. Higdon Constr. Co.*, 739 F.2d 280 (1984), the court affirmed a magistrate's order to an employer to pay wages and benefits to union members pursuant to a prehire agreement. In *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1057 (7th Cir. 1983), Posner dissented from a reversal from a district judge's refusal to set aside an award of jury damages, holding the worker's state tort claim should not have been preempted by the Railway Labor Act, as the majority held. In *Ceres Marine Terminals, Inc. v. International Longshoremen's Ass'n*, 683 F.2d 242 (7th Cir. 1982), the court affirmed a stay on litigation appealed by an employer pending arbitration.

*Reversals of district court decisions in which a worker or union had been unsuccessful in a dispute in whole or part against an employer:* In *Colby v. J.C. Penney*, 811 F.2d 1119 (7th Cir. 1987), the court reversed and remanded a district court's denial of class certification, and dismissal of an action that claimed that the "head of household" eligibility rule for medical and dental plans discriminated on the basis of sex. In *Kirk v. Breman Community Dist. Bd. of Educ.*, 811 F.2d 347 (7th Cir. 1987), the court reversed a dismissal on procedural grounds of a claim of sex discrimination by former teachers. In *Spearing v. National Iron Co.*, 770 F.2d 87 (7th Cir. 1985), Posner, writing for the court, reversed a district judge's dismissal of an injured Canadian worker's injury in a diversity suit on contributory negligence grounds, and found that Canadian worker's compensation law did not preclude award of damages against an American Corporation. In *Hudson v. Chicago Teachers Union Local 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 472 U.S. 1007 (1985), Posner, writing for the court, reversed a district judge's holding that a union's procedure for determining the share that nonunion employees would be required to contribute to the support of the union as the collective bargaining agent was not constitutionally inadequate.

*Reversals of district court decisions in which a worker or union had been successful in a dispute in whole or in part against an employer:* In *Szabo v. United States Marine Corps*, 819 F.2d 714 (7th Cir. 1987), Posner, writing for the court, reversed a district court injunction against an employer that the NLRB had obtained to preserve the status quo pending completion of unfair labor practice proceedings, and allowed the employer's appeal from a civil contempt order for noncompliance with the injunction. In *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982), Posner, writing for the court, reversed a decision appealed by the Secretary of Labor ordering a union election on the grounds that the election rules violated the Labor-Management Reporting and Disclosure Act.

twenty-nine labor cases which involved appeals of decisions by arbitrators or state or federal administrative agencies; these were cases, that is, where deference to an administrative body or other non-judicial dispute resolution body is possible. Of those twenty-nine cases, one was dismissed on jurisdictional grounds<sup>157</sup> and one had to do with attorneys' fees.<sup>158</sup> Of the remainder Posner wrote opinions or dissents affirming the administrative agency's, or arbitrator's, decision in sixteen cases and reversing it, in whole or in significant part, in eleven. In the affirmances it was not possible to detect any evidence of bias concerning outcomes on Posner's part; eleven were cases in which a worker or a union was successful in the nonjudicial forum, while five were cases in which labor had been unsuccessful.<sup>159</sup> A case might be made that in *Miller*

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157. *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 721 F.2d 629 (7th Cir. 1983).

158. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982).

159. *Affirmances of an administrative agency or arbitrator where a worker or union succeeds*: In *Dries & Krump Mfg. Co. v. International Ass'n of Machinists*, 802 F.2d 247 (7th Cir. 1986), Posner, writing for the court, upheld an arbitrator's award ordering an employee to cancel subcontracting, terming employer's action frivolous. In *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987), Posner, for the court, ordered enforcement of an NLRB remedial order, the employer's unfair labor practices including firing of supervisor for son's union activities when she had not assisted him and laying off workers without required negotiation. In *Ethyl Corp v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986), the Court overturned a district court order setting aside an arbitrator's decision on the ground that it did not draw its essence from the collective bargaining agreement. Writing for the Court, Posner affirmed the non interventionist stance that in reviewing arbitration awards the scope of federal judicial review is extremely narrow. In *Jones Dairy Farm v. Local P-1236*, 760 F.2d 173 (7th Cir.), *cert denied*, 106 S.Ct. 136 (1985), he reversed (at petition for rehearing) an earlier affirmance of a district court's setting aside of an arbitration award forbidding a company to contract out work, holding that by going forward with arbitration the company was binding itself to the arbitrator's result. In *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985), Posner held for the Court that in payments of benefits to a widow in a black lung case, the decision of a Benefits Review Board in reversing the finding of an administrative law judge should itself be set aside because in such cases the Benefits Review Board does not have the power of *de novo* review of factfindings when there is substantial evidence in the record supporting the administrative law judge's findings below but affirmed the Board's decision in this case. In *Jones Dairy Farm v. Local P-1236 United Food & Commercial Workers Int'l Union*, 755 F.2d 583, 584 (7th Cir.), *rev'd*, 760 F.2d 173 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985), Posner dissented from an affirmance of a district judge's order setting aside an arbitration award in favor of a union on the grounds that judicial review of arbitration awards is limited to cases where there is "clear error" by the arbitrator and that this had not been found. In *Miller Brewing Co. v. Brewery Workers Local 9*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), he upheld summary judgment by a district court denying an employer's action to set aside an arbitrator's award dealing with interpretation of a rehiring clause of a collective bargaining agreement (although he struck down the arbitrator's remedy as impermissibly broad). In *NLRB v. Acme Die Casting Corp.*, 728 F.2d 959 (7th Cir. 1984), he upheld an NLRB petition for an enforcement order of its finding that the company had violated unfair labor practice provisions of the NLRA by laying off two workers during a union organizing campaign (although he reversed that part of the order which found that questioning the worker was "impermissible interrogation"). In *East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984), he enforced an NLRB order (over the dissenting opinion of a colleague who would have found for the employer), holding that a spontaneous two-hour walkout by seventeen nurse's aides at a nursing home was protected activity under the Act, so that those fired were entitled to reinstatement with back pay. In *NLRB v. RES-CARE, Inc.*, 705 F.2d 1461 (7th Cir. 1983), he enforced an NLRB order finding that seven licensed practical nurses were employees within the meaning of the NLRA and could form their own collective bargaining unit. In *NLRB v. Coca-Cola Foods Div.*, 670 F.2d 84 (7th Cir. 1982), he granted an NLRB petition for an enforcement order prohibiting an employer from interfering with concerted activities and finding that the employer had violated the NLRA by threatening to retaliate against an employee if he discussed a grievance with other employees.

*Affirmances of an administrative agency or arbitrator where a worker or union fails*: In *In Cook v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1182 (7th Cir. 1987), Posner denied petition to review Benefits Review Board's denial of black lung disability benefits from employer, because one positive x-ray does not mean the administrative law judge cannot consider other negative x-rays in deciding whether interim presumption of pneumoconiosis has been established by claimant. In *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987), Posner, writing for the court, affirmed a public law board's rejection of an employee's claim to have been wrongly discharged following a guilty plea to possession of marijuana. In *Elmore v. Chicago & Ill. Mid. Ry.*, 782 F.2d 94 (7th Cir. 1986), Posner, writing for the court, declined to reverse a decision of the National Railroad Adjustment Board to fire a worker



*Brewing Co. v. Brewery Workers Local 9*<sup>160</sup> Posner might have deferred to the arbitrator's remedy as well as his other findings, and that in *NLRB v. Acme Die Casting*<sup>161</sup> he might have upheld the NLRB's finding of interrogation,<sup>162</sup> but in general these cases indicate consistent and even-handed (with respect to labor and capital) deference to nonjudicial forms of dispute resolution, in accordance with his efficiency preference for promoting cheaper forms of dispute resolution and deferring to administrative agencies. The same is not true, however, when we examine opinions and dissents Posner has written reversing the decisions of arbitrators and administrative agencies. Out of the eleven opinions in this class, all but one are reversals in which a worker or union loses as a result of the reversal, or in which this would be the case had Posner persuaded his colleagues.<sup>163</sup> In these cases we find

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who had been moonlighting and had claimed that he had been denied due process by the Board on the grounds that the Board was not for review purposes a federal agency and not subject to due process requirements. In *Brotherhood of Locomotive Eng's v. Atchison, T & S. F. Ry.*, 768 F.2d 914 (7th Cir. 1985), he upheld an arbitrator's decision (against a union's appeal from dismissal in district court), that, *inter alia*, a seniority provision in a collective bargaining agreement was obsolete as a permissible interpretation of the agreement rather than as a modification of it. In *Miller v. Federal Mine Safety & Health Comm'n*, 687 F.2d 194 (7th Cir. 1982), he declined to set aside a decision of the Federal Mine Safety and Health Review Commission that had found that a worker who had refused to start a machine he believed to be dangerous, but had failed to follow the correct reporting procedures, was not entitled to benefits of the antiretaliation provision of the Federal Mine Safety and Health Act.

160. 739 F.2d 1159 (7th Cir. 1984).

161. 728 F.2d 959 (7th Cir. 1984).

162. See *supra* note 159.

163. *Reversals where a worker or union had initially succeeded before an administrative agency or arbitrator:* In *NLRB v. Certified Grocers of Ill., Inc.*, 806 F.2d 744 (7th Cir. 1986), Posner, for the court, denied enforcement of NLRB order that found interference with employee rights in employer's statement to employees that it considered names, addresses, and wages confidential and employees subject to discipline for divulging the information, holding the statement could not be construed as establishing a rule that any disclosure of that information was subject to discipline, however the information was obtained. In *National Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir.), *cert. denied*, 107 S. Ct. 403 (1986), Posner, writing for the court, granted an employer's appeal from a decision by the administrator of the Illinois State Wage Payment and Collection Act ordering him to pay vacation benefits on the grounds that the statute was preempted by federal labor laws. In *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984), he granted an employer's petition for review of a bargaining order and refused to enforce it on the grounds that the NLRB departed from its usual procedures for certifying the size of the bargaining unit without giving an adequate explanation. In *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983), Posner, writing for the court, refused to enforce a bargaining order imposed by the NLRB as a remedy for unfair labor practices, holding that it was an excessive sanction for those unfair labor practices which were upheld on appeal. In *NLRB v. American Medical Serv., Inc.*, 705 F.2d 1472 (7th Cir. 1983), Posner held, for the court, that substantial evidence failed to support a bargaining order of the NLRB which had certified a union consisting of seventeen registered nurses employed at a nursing home, since the record showed that the nurses were supervisors within the meaning of the NLRA. In *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983), Posner held, for the Court, with two judges dissenting on the grounds, *inter alia*, that the court did not have the power of *de novo* review, that an NLRB bargaining order would not be enforced when the Board had twice changed its mind about whether to protect workers from misrepresentations made in union election campaigns, subjecting the employer to protracted legal expense. In *NLRB v. Browning Ferris Indus.*, 700 F.2d 385 (7th Cir. 1983), Posner held for the court that a Board order finding that the employer had committed an unfair labor practice by terminating two workers who had refused to cross a picket line at a customer's premises would not be enforced, even though the refusal to cross the picket line was protected activity within the meaning of the Act. In *NLRB v. Loy Food Stores, Inc.*, 697 F.2d 798 (7th Cir. 1983), for the court, Posner denied (in part) enforcement of an NLRB order to reinstate two teenage employees who had been discharged during a union organizing campaign on the grounds that it had failed to establish discriminatory discharge of the employees. In *Brotherhood of R.R. Signalmen v. Louisville & N. R.R.*, 688 F.2d 535 (7th Cir. 1982), Posner dissented from an affirmance of a summary judgment enforcing an award of the Public Law Board in favor of a union on behalf of a dismissed railroad employee, arguing that it was not possible simply to uphold the Board's decision without interpreting it. In *W.W. Grainger, Inc. v. NLRB*, 677 F.2d 557 (7th Cir. 1982), writing for the court, Posner granted an employer's petition to set aside an NLRB order finding that an employer had coercively interrogated a worker in violation of the NLRA.

*Reversals where employer had initially succeeded before an administrative agency or arbitrator:* In *International Union, United Auto., Aerospace & Agric. Implement Workers v. NLRB*, 802 F.2d 969 (7th Cir. 1986), Posner, for the

Posner violating his preference for judicial self-restraint, overturning decisions by arbitrators and administrative agencies, almost always to the detriment of labor.

Of course, attending only to Posner's opinions and dissents does not reveal the full story of his voting record in labor relations cases. During this period he participated (without authoring an opinion or dissent) in a further twenty-eight cases which involved review of decisions of arbitrators, the NLRB or other government agencies. Two of these dealt with the jurisdiction of the Occupational Safety and Health Review Commission and Occupational Safety and Health Administration regulations,<sup>164</sup> while a third involved a dispute between a union and one of its members.<sup>165</sup> Of the remainder, nineteen were affirmances and six were reversals. Of the affirmances, fifteen resulted in the employer losing, while four resulted in the worker or union losing, and five of the six reversals went against a worker or union.<sup>166</sup> This means that of the total of fifty-seven decisions involving review of

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court, reversed the NLRB's dismissal of a union's charge that a company had not bargained in good faith because the board failed to provide a coherent rationale for its decision.

164. *Texas E. Prods. Pipeline Co. v. Occupational Safety & Health Review Comm'n*, 827 F.2d 46 (7th Cir. 1987); *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909 (7th Cir. 1987).

165. *NLRB v. Local 139, Int'l Union of Operating Eng'rs*, 796 F.2d 985 (7th Cir. 1986).

166. *Affirmances of an arbitrator or administrative agency where a union or worker loses*: In *Anderson v. Norfolk & W. Ry.*, 773 F.2d 880 (7th Cir. 1985), the court held that a group of railroad employees lacked standing to seek to overturn an arbitration award made in a proceeding in which they did not participate and in which they were represented by their union. In *Hardisty v. Director, Office of Workers' Compensation Programs*, 776 F.2d 129 (7th Cir. 1985), in a review of a denial of black lung benefits, the court held that the director of the Labor Department's Office of Workers' Compensation could use the physician's depositions earlier used by the employer. In *International Union Local 1712 v. NLRB*, 732 F.2d 573 (7th Cir. 1984), the court declined to reverse an NLRB dismissal of a complaint alleging that an employer had failed to engage in good faith bargaining. In *Walsh v. United States*, 723 F.2d 570 (7th Cir. 1983), the court affirmed the Interstate Commerce Commission's dismissal of a complaint alleging a denial of protective arrangements under the Staggers Rail Act because, on the Commission's construction of the Act, which is due considerable deference, it did not have jurisdiction to hear the complaint.

*Affirmances of an administrative agency or arbitrator where an employer loses*: In *NLRB v. Western Temporary Servs., Inc.*, 821 F.2d 1258 (7th Cir. 1987), the court granted enforcement of an unfair labor practice order determining that part-time employees should be included in a bargaining unit and requiring their employer to bargain. In *NLRB v. Southwestern Elec.*, 794 F.2d 276 (7th Cir. 1986), the court granted enforcement of an NLRB order finding that employer violated the National Labor Relations Act by refusing to process grievances unless put in writing, given a 30 year history of processing oral grievances. In *NLRB v. Auburn Foundry, Inc.*, 791 F.2d 619 (7th Cir. 1986), the court enforced an NLRB order upholding an administrative law judge's finding that an employer had engaged in discriminatory discharging of employees for activities during a strike, and his recommendations for reinstatement with back pay. In *E.I. Du Pont de Nemours & Co. v. Grasselli Employees Indep. Assoc.*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 186 (1986), the court reversed a district judge's setting aside of an arbitration award ordering reinstatement of a worker who had been discharged after he experienced a mental breakdown which resulted in his attacking his supervisor. In *NLRB v. Manley Truck Line, Inc.*, 779 F.2d 1327 (7th Cir. 1985), the court enforced an NLRB order finding an employer to have engaged in an unfair labor practice by implementing a mandatory wage deferral program, despite a showing of economic necessity by the employer. In *Plumbers' Pension Fund Local 130 v. Domas Mechanical Contractors*, 778 F.2d 1266 (7th Cir. 1985), the court upheld summary judgment by a district judge enforcing an arbitration award against an employer who had failed to meet the relevant procedural guidelines for its appeal. In *NLRB v. Pfizer, Inc.*, 763 F.2d 887 (7th Cir. 1985), the court enforced an NLRB order finding that an employer had violated the NLRA by refusing to supply information relevant to the processing of an employee grievance. In *NLRB v. Methodist Hosp. of Gary, Inc.*, 733 F.2d 43 (7th Cir. 1984), the court enforced an NLRB order requiring a hospital to desist from discriminatory refusal of permission for certain elections to be held in the hospital cafeteria. In *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349 (7th Cir. 1984), the court rejected an employer's appeal of a decision by the NLRB adopting the recommended order of an administrative law judge who had concluded that the employer had committed unfair labor practices by laying off certain employees and by coercively interrogating and threatening employees with reprisal for union activity. In *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67 (7th Cir. 1983), the court denied a stay pending review of an order of the United States Department of Labor requiring a joint venture to reinstate an employee who had been discharged for engaging in activity protected by the Energy Reorganization Act. In *NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187 (7th Cir. 1983), the court granted an NLRB petition to enforce its order affirming an administrative law judge's holding that a shipbuilding company had

arbitrators or state or federal agencies in which Posner either wrote the majority opinion, joined it, or wrote a dissenting opinion, five were dealt with on grounds not material to this analysis, thirty-five were affirmances, and seventeen were reversals. Of the affirmances, the employer lost twenty-six times and the worker or union lost nine times, and of the reversals the worker or union lost fifteen times, and won twice. So while Posner's voting record seems even-handed, even comparatively generous to labor, in his affirmances, his strong tendency to vote for reversals to the disfavor of labor is clear.

Thus, despite Posner's emphasis on the "strong federal policy in favor of arbitrating disputes in general and labor disputes in particular," in *Graphic Communications Union v. Chicago Tribune Co.*,<sup>167</sup> despite his noting that "[e]ver since federal courts began enforcing arbitration awards, the scope of judicial review of the award has been extremely narrow," and despite his further noting in *Ethyl Corp. v. United Steelworkers*,<sup>168</sup> and that an administrative law judge's decision in a black lung case cannot be reversed by the Benefits Review Board if supported by "substantial

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committed an unfair labor practice by refusing to recognize and bargain with a union and by refusing to apply the terms and conditions of a collective bargaining agreement to some of its employees. In *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131 (7th Cir. 1983), the court enforced an order finding an employer in violation of the NLRA for unlawfully interrogating employees about their union sympathies, threatening to withhold pay increases and other benefits because of a union organizing drive, and laying off employees for union organizing activities. In *NLRB v. Milwaukee Brush Mfg. Co.*, 705 F.2d 257 (7th Cir. 1983), the court enforced an NLRB bargaining order against a company issued as a result of the Board's finding that the company had refused to bargain with, and furnish information to, the union on the ground that the Board's finding was supported by substantial evidence. In *NLRB v. Gold Standard Enters. Inc.*, 679 F.2d 673 (7th Cir. 1982), the court granted an NLRB petition for enforcement of its order against an employer who was found to have committed numerous unfair labor practices, including making illegal inquiries into union activities during an organizing campaign, creating the impression that it was surveilling union activities, and threatening employees with reprisals for continuing to support the organization drive. In *Advertisers Mfg. Co. v. NLRB*, 677 F.2d 544 (7th Cir. 1982), the court rejected an employer's petition to set aside an NLRB finding refusing to set aside a representation election. It found that the Board had not abused its discretion in overruling the employer's election objections and finding of a violation of the NLRA, and that in view of the unilateral changes made by the employer since the election, a temporary injunction had properly issued.

*Reversals of an administrative agency or arbitrator where a worker or union subsequently loses:* In *Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987), the court refused to enforce an NLRB order incorporating an administrative law judge's finding that redistribution achieved by employer through layoffs in higher grade levels so as to allow workers with seniority to "bump" more junior workers to be an unfair labor practice. In *Prairie Tank S., Inc. v. NLRB*, 710 F.2d 1262 (7th Cir. 1983), the court granted an employer's petition for review, and denied enforcement, of a bargaining order, holding *inter alia* that the company had raised material issues of fact indicating that the union may have been improperly certified. In *Peabody Coal Co. v. Lewis*, 708 F.2d 266 (7th Cir. 1983), the court granted the petition of a coal company and its insurer for review of a decision of the Benefits Review Board of the U.S. Department of Labor affirming an administrative law judge's award of benefits for black lung disease. The court found that the interim presumption of employment-caused pneumoconiosis was adequately rebutted by a physician's clear and uncontradicted testimony that the disease was due to cigarette smoking. In *NLRB v. Howard Johnson Motor Lodge*, 705 F.2d 932 (7th Cir. 1983), the court denied enforcement of an NLRB bargaining order and required that it hold a hearing to determine the truth of the employer's claims that a supervisor had engaged in pro-union coercive activities during a representation election. In *Jack Thompson Oldsmobile, Inc. v. NLRB*, 684 F.2d 458 (7th Cir. 1982), the court reversed part of an NLRB order, holding that the Board had abused its discretion by failing to consider whether the employer was authorized by the collective bargaining agreement to unilaterally require salespersons to observe a turnover rule as a condition for receiving a commission on the sale of an automobile, prior to finding that the employer's rule was an unlawful unilateral change.

*Reversals of an administrative agency or arbitrator where a worker or union subsequently wins:* In *Local P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982), the court affirmed a district judge's ruling setting aside an arbitration award in favor of a company, holding that the company's rule forbidding workers from dealing with the U.S. Department of Agriculture was defective.

167. 779 F.2d 13, 15 (7th Cir. 1985).

168. 768 F.2d 180, 183 (7th Cir. 1985).

evidence” in *Old Ben Coal Co. v. Prewitt*,<sup>169</sup> he has not adhered consistently to the “noninterventionist” view. Furthermore, while some of the reversals Posner has authored involve genuine unclarity about questions of law, such as whether and in what circumstances a nurse is a supervisor within the meaning of the National Labor Relations Act (“NLRA”),<sup>170</sup> at least some involve *post hoc* de novo re-evaluation of the factual record from a court, arbitrator, or administrative agency below, in violation of both traditional principles of judicial review and Posner’s conception of “macro-judicial” efficiency. Here are some examples. In *Continental Web Press, Inc. v. NLRB*,<sup>171</sup> Posner rejected the Board’s certification of the pressmen in a company as a union, rather than part of a larger union, despite his acknowledgment that the NLRB need only choose an appropriate bargaining unit (not the most appropriate one), that the union wanted to be thus designated, and that the reviewing court’s power is restricted to ensuring that the Board apply its own procedures with reasonable consistency. “The greatest conflicts of interest among workers are over wages, fringe benefits and working conditions”, he argued, “[b]ut there do not seem to be any significant differences between the preparatory employees [constituting the existing union] and the pressmen in *Continental Web’s* plant along any of these dimensions.”<sup>172</sup> Yet whether these claims are true are surely questions of fact which the NLRB is better equipped to decide on the basis of testimony before it than a reviewing court. In *NLRB v. Acme Die Casting Corp.*,<sup>173</sup> although he enforced the Board’s order on other grounds, Posner found that an administrative law judge had been wrong in finding that questions to a worker by his supervisor concerning the union amounted to coercive interrogation within the meaning of the NLRA. Posner noted that

the courts . . . have identified a number of factors as relevant to deciding whether a particular inquiry is coercive, though we and other courts have made clear that these factors provide general guidelines rather than a formula for decision. The factors are the tone, duration and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the interrogator’s authority, the ambience of the questioning (has the company created an atmosphere of hostility to the union?), and, more doubtfully, whether the worker answers truthfully.<sup>174</sup>

But just because these factors go to the factual makeup of the situation, great deference is supposed to be due to the hearing officer or tribunal that hears the witnesses, rather than to a reviewing judge’s *post hoc* speculations as to whether or not the worker understood the question the employer asked.<sup>175</sup>

In *NLRB v. Village IX, Inc.*,<sup>176</sup> this *post hoc* redeciding of factual questions is perhaps most blatant. In that case a company had petitioned for review of an NLRB bargaining order imposed as a remedy for alleged unfair labor practices during a

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169. 755 F.2d 588, 589 (7th Cir. 1985).

170. *NLRB v. American Medical Serv., Inc.*, 705 F.2d 1472 (7th Cir. 1983).

171. 742 F.2d 1087 (7th Cir. 1984).

172. *Id.* at 1091.

173. 728 F.2d 959 (7th Cir. 1984).

174. *Id.* at 962 (citations omitted).

175. *Id.*

176. 723 F.2d 1360 (7th Cir. 1983).

union organizing campaign. Although some of the Board's findings were affirmed, the Board's remedy was considered an excessive sanction on the grounds that questioning a retarded employee about the union was not an unfair labor practice and that a speech made by the employer to the employees about the union was not coercive within the meaning of the Act. Among other things this speech included the following:

Unions do not work in restaurants. . . . The balance is not here . . . . If the Union exists at Shenanigans, Shenanigans will fail. That is it in a nutshell . . . . I won't be here if there is a Union within this particular restaurant. I am not making a threat. I am making a statement of fact . . . . I respect anyone who wants to join the union if that in essence is a workable place and can afford to pay Union wages. We can't in the restaurant business . . . . Shenanigans can possibly exist with labor problems for a period of time. But in the long run we won't make it. The cancer will eat us up, and we will fall by the wayside. And if you walk into this place five years down the road, if there is a Union in here, then I guarantee you it won't be a restaurant . . . . I am not making a threat. I am stating a fact. When you are dealing with the Union you had better consider the pros and cons. I haven't looked into them a great deal because this is my first experience with them. I only know from my mind, from my heart and from my pocketbook how I stand on this. And I don't like the idea of looking at a Union as far as my employees are concerned.<sup>177</sup>

The NLRB held that this speech was coercive, but Posner reversed this finding, holding that the employer offered a "competent if extremely informal analysis of likely economic consequences of unionization in a highly competitive market."<sup>178</sup> He acknowledged that "[s]ince the only effective way of arguing against the union is for the company to point out to the workers the adverse consequences of unionization, one of which may be closure, it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation."<sup>179</sup> Yet Posner offered no reasons for thinking that a reviewing court was in this instance better placed than the Board to make this determination, noting only that the Board did not question the factual accuracy of the employer's speech.<sup>180</sup> If an employer's description of a union as "cancer" is not sufficient in this connection to substantiate the Board's findings that it was threatening to the workers, it is difficult to imagine what could be. On the issue of coercion, the record was replete with evidence that the speech was coercive, apart from its very terms. The following Board findings were upheld: that the discharge of a union organizer and an assault on another organizer were unfair labor practices within the meaning of the Act; that the company's "no-distribution" rule, adopted the day the organizer was reinstated, was an unfair labor practice; that preventing the organizer from distributing leaflets in the restaurant parking lot was an unfair labor practice, and that delaying the mailing of the employee-organizer's invitations to the company's anniversary party was an unfair labor practice.<sup>181</sup> If these findings are not themselves conclusive evidence that a company has created an atmosphere of hostility

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177. *Id.* at 1364.

178. *Id.* at 1367.

179. *Id.*

180. *Id.*

181. *Id.* at 1360.

toward a union, so that both the speech and the questioning of the employee could reasonably have been found by the Board to be coercive, it is difficult to imagine what could constitute such evidence. For Posner to suggest that “[n]othing in the circumstances . . . suggests that the question [to a retarded employee about whether he had been visited by the union] had a natural tendency to discourage him from voting for the union”<sup>182</sup> is less than credible. Perhaps a case might be made that a court or tribunal hearing the evidence might have reached this result (although it is difficult to imagine how), but that is not the standard for appellate review.

These examples are sufficient to establish that, in the labor cases at least, Posner the judge does not consistently adhere to traditional principles of deference to administrative agencies, and he thereby violates at least one component of his theory of “macro-judicial” efficiency, namely a “rededication by federal judges to the principles of judicial self-restraint.”<sup>183</sup> Furthermore, we have seen that Posner’s reversals work to the systematic disadvantage of labor, as does at least some of his *post hoc* “economic analysis” of factual questions.

### B. *The Antitrust Opinions*

Antitrust is a “quasi” common law field in Posner’s terms, one which is largely governed by statute but involving utilitarian balancing in its application. Because antitrust litigation invariably involves complex factual argument and also involves economic reasoning on a subject in which Posner has considerable expertise,<sup>184</sup> it provides a useful test of his fidelity to traditional notions of deference to lower courts on questions of fact, an important component of his conception of macro-judicial efficiency, and of the role of economic reasoning in his own utilitarian balancing in practice. Between 1982 and September 1987, Posner was involved in deciding twenty-three antitrust cases on the Seventh Circuit, and he wrote the opinion of the majority in twenty of them. In fifteen of the total the opinion affirmed the decision below, in eight it reversed that decision insofar as the substantial antitrust issues in the litigation were concerned.<sup>185</sup> Of the three cases in which he joined, but did not

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182. *Id.* at 1369 (citations omitted).

183. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 319.

184. *See, e.g.*, R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976) [hereinafter POSNER, *ANTITRUST LAW*].

185. *Affirmances of district court or administrative agencies where plaintiff was successful in antitrust case: Hospital Corp. of Am. v. FTC*, No. 85-3185 (7th Cir. December 18, 1986) (Posner, writing for the court, affirmed the FTC’s decision that acquisitions violated section 7 of the Clayton Act because of their anticompetitive effects.); *General Leaseways, Inc. v. National Truck Leasing Ass’n*, 744 F.2d 588 (7th Cir. 1984) (Posner, writing for the court, affirmed a preliminary injunction granted by a district judge as there was a *per se* violation of section 1 of the Sherman Act and the plaintiff had made the requisite showing of the likelihood of irremediable harm.).

*Affirmances of district court where defendant was successful in antitrust case, or where the functional plaintiff was unsuccessful in the antitrust component of another case: In Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), Posner, for the court, affirmed a district judge’s finding for defendant that its termination of one of its wholesale distributors did not violate antitrust laws. In *Dynamics Corp. v. C.T.S.*, 794 F.2d 250 (7th Cir. 1986), Posner, for the court, affirmed that part of a district judge’s holding dismissing antitrust allegations by the defendant in a corporate takeover suit. He held that it had not been established that in the event of the proposed takeover the same directors would sit on boards of both corporations in violation of the Clayton Act. *Seglin v. ESAU*, 769 F.2d 1274 (7th Cir. 1985) (The court affirmed a dismissal by a district judge of a physician’s antitrust complaint against a hospital that denied him privileges, holding that he had failed to allege any nexus with interstate commerce.); *Minsky v. Auto Driveway*, 757 F.2d 718 (7th Cir. 1985) (the court affirmed a district judge’s dismissal of a complaint alleging antitrust violations when the rates charged by the defendant had been approved by the Interstate Commerce Commission); *Brunswick Corp. v. Riegel*

write the majority opinion, all involved affirmances of the district court in favor of defendants.<sup>186</sup> Of the twenty-three decisions nineteen came out against plaintiffs or functional plaintiffs,<sup>187</sup> and four in favor of plaintiffs, only one of which was a

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Textile Corp, 752 F.2d 261 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) (Posner, writing for the court, affirmed a district judge's dismissal of a complaint alleging antitrust violations on the grounds that the commodity in question was patentable, and that the statute of limitations for an antitrust claim had run.); Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984) (Posner, writing for the court, upheld a district judge's denial of a preliminary injunction, holding that there was insufficient evidence that the society's rules against fixed-percentage appraisal fees by members amounted to price-fixing.); Walters v. Morton, 737 F.2d 698 (7th Cir. 1984) (Posner, writing for the court, affirmed a district judge's dismissal of parts of a complaint alleging that manufacturer's tie-in of its trademark to its products, and its attempts to get retailers to comply with its advertised price amounted to price-fixing.). In Sutliff v. Donovan, 727 F.2d 648 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984), Posner, writing for the court, affirmed a district judge's dismissal of a complaint by an oil wholesaler and its creditors on the grounds, *inter alia*, that unfair competition as such does not violate the antitrust laws, and plaintiffs had failed to state a claim establishing anticompetitive effects. University Life Ins. Corp. of Am. v. Unimarc Ltd., 699 F.2d 846 (7th Cir. 1983) (Posner, writing for the court, affirmed a district judge's order compelling arbitration in a dispute arising under agreements among the parties. Posner held that a collateral antitrust claim by the defendant was without merit because unfair competition in the tort sense does not violate federal antitrust laws, and therefore cannot delay arbitration.); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) (Posner, writing for the court, affirmed a district judge's dismissal of a motion for a preliminary injunction by a limited partnership alleging antitrust violation by the city in giving exclusive cable television rights to one company. Posner held that they had not established sufficient probability of success on the merits of the Sherman Act claims, or that they were likely to try to enter the cable television business before the end of the trial.); Products Liability Ins. Agency v. Crum & Foster Ins. Cos., 682 F.2d 660 (7th Cir. 1982) (Posner, writing for the court, affirmed a district judge's dismissal of a complaint by a lawyer/insurance broker against the insurer and his agency alleging antitrust violations. Posner held that the plaintiff could not prevail on the Sherman Act claim since he had demonstrated neither a conspiracy to exclude him, nor any anticompetitive effects.); Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982) (The court affirmed a district judge's holding that a former corporate president who was terminated by his company and blacklisted in the industry could not prevail in an antitrust claim under Section 4 of the Clayton Act, since the alleged injury was not an "antitrust injury" within the meaning of the Act.); Valley Liquors Inc. v. Renfield Importers Ltd., 678 F.2d 742 (7th Cir. 1982) (Posner, writing for the court, affirmed a denial of a preliminary injunction by a distributor to prevent its termination, holding that circumstantial evidence concerning the termination of one distributor was too tenuous to require the trier of fact to find that the supplier was attempting to eliminate competition.).

*Reversals of district court where plaintiff was unsuccessful in antitrust cases:* Isaksen v. Vermont Castings, 825 F.2d 1158 (7th Cir. 1987) (Posner, writing for the court, reversed the trial judge's decision setting aside jury verdict and, holding that to violate section 1 of the Sherman Act, defendant must have forced plaintiff to sell goods at a higher price and that plaintiff must have communicated to defendant that it would do so.); Grip Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) (Posner, writing for the court, reversed a dismissal of a complaint alleging antitrust violations, holding that it was dismissed on the wrong grounds (that defendant's behavior was "not malicious"), but that it might be properly dismissed on other grounds or fail on the merits.) *cert. denied*, 461 U.S. 958 (1982).

*Reversals of district court where plaintiff was successful in antitrust case, or where the functional plaintiff was successful in the antitrust component of another case:* In Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *petition for rehearing denied*, 802 F.2d 217 (7th Cir. 1987), Posner, writing for the court, reversed a district judge's decision holding, *inter alia*, that defendant did not violate section 2 of the Sherman Act and that the monopoly did not restrict competition in a related market. Roland Mach. v. Dresser Indus. Inc., 749 F.2d 380 (7th Cir. 1984) (Posner, writing for the court, vacated a district court judgment granting a preliminary injunction in an antitrust case, holding that anticompetitive effect had not been established.); Illinois v. Moran Inc., 740 F.2d 533 (7th Cir. 1984) (Posner, writing for the court, reversed an order by a district judge granting limited access to grand jury testimony at the discovery stage of an antitrust suit, holding that the relevant particularized need had not been shown.); Marresse v. American Acad. of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (Posner, writing for the court, reaffirmed its holding, after a rehearing, of the same case (see 706 F.2d 1488), and vacated a district court order requiring a medical association to produce confidential records at the discovery stage of antitrust litigation.) (These are treated as separate opinions for the purposes of this analysis. See *infra* discussion at 40-41.); USM Corp v. SFS Technologies Inc., 694 F.2d 505 (7th Cir. 1982) (Posner, writing for the court, reversed a district judge's order holding a patent invalid, and held, *inter alia*, that anticompetitive effect had not been established, that antitrust laws impose only negative duties, that there is no principle that patent owners may not engage in price discrimination or differential royalties.).

186. Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1983); Minsky v. Auto Driveway, 757 F.2d 718 (7th Cir. 1985); Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1985).

187. I use this term to designate the defendants in a non-antitrust case who raise collateral antitrust claims against the plaintiff which then become part of the ongoing litigation.

decision on the merits.<sup>188</sup> Of the reversals (all of which were authored by Posner) six were in favor of defendants while only two favored the plaintiff.

On the procedural question Posner does not adhere consistently to his own traditional view. In the cases in which he wrote opinions reversing a lower court decision in whole or in part, four provoked dissents from various of his colleagues arguing that an appellate court was without the authority to engage in *de novo* review of factual questions decided below. In *Roland Machinery Co. v. Dresser Industries*,<sup>189</sup> Posner reversed a district court decision granting a preliminary injunction in a claim against a domestic equipment manufacturer which had cancelled an exclusive distributorship with the dealer when it signed a similar agreement with a foreign manufacturer. Posner held that the evidence supporting the foreign manufacturer being harmed by an exclusive dealership was tenuous. Judge Swygert objected to Posner's opinion on the grounds that the discretion that inheres in the decision whether to grant a preliminary injunction cannot rest with the reviewing court, but must lie in the district court and should only be reversed if that discretion is abused.<sup>190</sup> In *Illinois v. F.E. Moran, Inc.*,<sup>191</sup> Posner, writing for the Seventh Circuit, reversed a district court order for disclosure of grand jury testimony by defendants in an antitrust suit on the grounds that the plaintiff had failed to make the required showing of particularized harm.<sup>192</sup> Judge Cudahy dissented on the grounds that it was wholly unprecedented to find, as a matter of law, that the particularized need did not exist, and that at most the case should be remanded for a determination of the plaintiff's particularized harm.<sup>193</sup> The Supreme Court has prescribed a balancing test for determining when the interest in maintaining secrecy of grand jury testimony outweighed the interest of those seeking disclosure and emphasized that the district court judge has considerable discretion in evaluating those interests. In Judge Cudahy's view "[w]e should not undertake to usurp the discretion vested in the district court judge nor should we substitute our view for that of the district judge who, once the correct legal standard is applied, is in the better position to make the factual determination."<sup>194</sup>

In *Marrese v. American Academy of Orthopaedic Surgeons*,<sup>195</sup> Posner authored an opinion vacating a district judge's finding of contempt after the defendant in an antitrust action refused to produce its files in conformity with his discovery order. This was in fact an opinion on a petition for rehearing after *Maresse v. American Academy of Orthopaedic Surgeons*<sup>196</sup> had resulted in a reversal of the district court's discovery order (also authored by Posner). The controversy concerned whether the defendant (the American Academy of Orthopaedic Surgeons) had an interest in not

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188. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

189. 749 F.2d 380 (7th Cir. 1984).

190. *Id.* at 398-99.

191. 740 F.2d 533 (7th Cir. 1984).

192. *Id.* at 539.

193. *Id.* at 541.

194. *Id.* at 541.

195. 726 F.2d 1150 (7th Cir. 1984).

196. 706 F.2d 1488 (7th Cir. 1982).



divulging its records, which contained information material in an antitrust suit, so as to preserve its clients' confidentiality and, thus, bar discovery. The district court judge resolved this by ordering discovery pursuant to a restrictive protective order. In the prior review Judge Stewart dissented on the ground that the district judge has discretion to order discovery in an antitrust violation and should be reversed on appeal only if there is "clear error," or that the district judge had abused his discretion.<sup>197</sup> Judge Stewart further stated that there was no evidence of such abuse of discretion.<sup>198</sup> After the original opinion had been vacated, Posner authored a second opinion holding that the suit was barred under the doctrine of res judicata because the plaintiff had previously failed in a state action against the defendant.<sup>199</sup> Judge Harlington Wood, Jr., writing also for Judges Cummings and Cudahy, dissented on the grounds that the prior opinion had "created the impression that this court was trying the case on its antitrust merits before it had much of a chance to get started in the trial court," and that this "prejudgment pall still hangs heavy over Judge Posner's latest opinion."<sup>200</sup> The dissenters argued, *inter alia*, that there was no basis for the reversal since Posner's majority opinion itself had demonstrated no abuse of discretion by the district judge,<sup>201</sup> so that the court was illicitly usurping its authority. No doubt Posner would dispute these assertions, but it is notable that four different judges reached the conclusion that this was illicit interference with the discretionary authority of the district court judge in an antitrust case.<sup>202</sup>

Even when Posner affirms a lower court decision, he can provoke his colleagues to write separate opinions dissociating themselves from his unnecessary theorizing about the lego-economic dicta. For example, in *Brunswick Corp. v. Riegel Textile*,<sup>203</sup> Judge Harlington Wood dissociated himself from a long and irrelevant discussion of the relationship between antitrust and patent law, which Posner engaged in in the course of affirming a district judge's dismissal of an action barred by the statute of limitations.<sup>204</sup> Again, in *Jack Walters & Sons Corp. v. Morton Building*,<sup>205</sup> Judge Swygert filed a separate opinion concurring in the result, an affirmance of a district judge's summary judgment for the defendant in an antitrust suit, but dissociating himself from Posner's long majority opinion discussing the nature of, and limits to, antitrust law and standing in antitrust cases. "I cannot concur in much of the discussion contained in the majority opinion," he wrote, "not because that discussion may not state correct principles of law, but because I believe it is dicta—dicta that might tend to influence and prejudice decisions in cases yet un-

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197. *Id.* at 1493–94.

198. *Id.* at 1498.

199. 726 F.2d 1150, 1152–56 (7th Cir. 1983).

200. *Id.* at 1167.

201. *Id.* at 1171–72.

202. I do not suggest that Posner *never* defers to the lower court or administrative findings in an antitrust case to the benefit of plaintiffs, only that in the great majority of cases he does not. For a notable exception, arguably the exception that proves the rule see *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

203. 752 F.2d 261 (7th Cir. 1984).

204. *Id.* at 272.

205. 737 F.2d 698 (7th Cir. 1984).

born. . . .”<sup>206</sup> These various concurrences and dissents make it clear that in the antitrust field Posner does not heed his own principles of macro-judicial efficiency, which include encouraging judges to write shorter opinions and to observe traditional roles of deference and self-restraint.<sup>207</sup> When Posner believes he is right on the merits he seems to find a way to review and reverse a district judge.

And of course in antitrust law, as in all areas of law that involve economic theory, various theories contend with one another. Posner has long been known for a minimalist view of antitrust law, that it should have no goal other than preventing collusive pricing and that all antitrust laws other than Section 1 of the Sherman Act should be repealed.<sup>208</sup> His opinions as a judge certainly reflect this view. Of the twenty antitrust opinions Posner authored in this period eight involved reversals of a district judge’s decision or order. All but two of these<sup>209</sup> were reversals in favor of the defendant neither of which were decided on the merits. The plaintiff was successful with respect to its antitrust claim in only four of the twenty-three final results,<sup>210</sup> and only one dealt with antitrust proper.<sup>211</sup> Of the other three, one affirmed a district judge’s preliminary injunction, and Posner went out of his way to note that it was not clear that the plaintiff would prevail on the merits.<sup>212</sup> In the second, Posner, writing for the court of appeals, reversed a district judge’s summary dismissal of a complaint, arguing that the grounds for dismissal had not been proper, but noting that there might be other grounds for dismissal and that the plaintiff still might fail on the merits.<sup>213</sup> In the third case, again writing for the court of appeals, Posner found that a jury verdict for a plaintiff in an antitrust suit had been improperly set aside, but explicitly withheld judgment on the defendant’s liability.<sup>214</sup> These overall results cannot be surprising. Judge Posner believes that the the entire Clayton Act, all the antitrust provisions of the Federal Trade Commission Acts, and all but Section 1 of the Sherman Act should be repealed, that existence of too much “redundant” antitrust legislation has led to “an uncritical and unwise expansion in the prohibitory scope of antitrust.”<sup>215</sup> Thus, he is bound to fill the Dworkinian gaps in the law with restrictive interpretations of antitrust legislation, to place heavy burdens on plaintiffs in antitrust suits, and to decline to permit preliminary injunctions to issue in circumstances where he believes that the plaintiff should have no chance of success on the merits. If Posner was a district court judge this might be unobjectionable. A

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206. *Id.* at 713.

207. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 319.

208. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 212–17 (1976) [hereinafter POSNER, *ANTITRUST LAW*].

209. *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1982); *Isaksen v. Vermont Castings*, 825 F.2d 1158 (7th Cir.1987). In both cases, judgment was explicitly reserved on the merits.

210. In *University Life Ins. Co. v. Unimarc*, 699 F.2d 846 (7th Cir. 1983), Posner, writing for the majority, affirmed a district court decision in favor of the plaintiff who was seeking arbitration of a contractual dispute. The antitrust issue in this case was raised by the defendant in a separate action and it was found to be insubstantial by Posner. From the point of view of this analysis, the defendant, who failed in its antitrust claim, should be regarded as an unsuccessful plaintiff. *See also* *Dynamics Corp. v. C.T.S.*, 794 F.2d 250 (7th Cir. 1986).

211. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1980).

212. *General Leaseways, Inc. v. National Truck Leasing Ass’n*, 744 F.2d 588, 597 (7th Cir. 1984).

213. *Grip-Pak v. Illinois Tool Works, Inc.*, 694 F.2d 466, 476 (7th Cir. 1982).

214. *Isaksen v. Vermont Castings*, 825 F.2d 1158, 1165 (7th Cir. 1987).

215. POSNER, *ANTITRUST LAW*, *supra* note 208, at 212.

district judge is often required to use discretion in the early stages of antitrust litigation, relating to restraining orders, injunctions, and discovery, and it seems likely that these decisions cannot be made without some implicit theory of the proper scope of antitrust. But as an appellate judge, whose task is to determine whether or not a district judge has abused his discretion, Posner has a quite different responsibility, and it is in this wholly different context that advancing one particular substantive economic theory as somehow the objective truth is pernicious. And it is inevitable that a reviewing judge who decides that an injunction should not issue on the grounds that a plaintiff cannot demonstrate fear of immediate harm or is unlikely to succeed on the merits, must make some substantive independent analysis of that harm and those merits that will be influenced by his particular economic theory. This can be seen clearly only by close analysis of the doctrinal manipulations in a particular case.

Consider, for example, *Roland Machinery Co. v. Dresser Industries*,<sup>216</sup> where Posner, writing for the majority, reversed a district judge's order granting an injunction to a construction equipment dealer against a domestic equipment manufacturer. The manufacturer had cancelled its exclusive retail agreement with the dealer when the dealer signed a similar agreement with a Japanese manufacturer.<sup>217</sup> At issue were both the appropriate standard for appellate review of preliminary injunctions and the substantive merits of the antitrust claim under the Clayton Act. On the first issue, Posner undertook a lengthy discussion of the different standards prevailing in different circuits and concluded that in this area more than perfunctory review was appropriate, because the power to issue preliminary injunctions is far-reaching, and because Congress would not have made an exception to the finality requirement for appealability of preliminary injunctions if it had intended appellate review of them to consist of mere rubber stamping of district judge decisions.<sup>218</sup> This means that the term "abuse of discretion" cannot in the injunction context mean merely that the lower judge must be said to have acted "irrationally or fancifully" as is the case in other areas. Yet Posner nonetheless acknowledged that "considering the imponderable character of the balancing process and the judge's superior feel for the issues which a cold transcript may not fully communicate to the reviewing court," reviewing courts should not substitute their own judgment for the district judge's. "The question for us is whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes."<sup>219</sup> This means that unless the judge made a "clear error of fact" or an error of law in issuing a preliminary injunction, he should not be reversed.

Yet even applying this more stringent than usual standard of review (and leaving aside what rationale it might be alleged to have in terms of Posner's theory of macro-judicial efficiency), Posner was not justified in reversing the district judge in this case. For a preliminary injunction to issue, the plaintiff must establish that

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216. 749 F.2d 380 (7th Cir. 1984).

217. *Id.* at 381-32.

218. *Id.* at 389.

219. *Id.* at 390.

“irreparable harm” will result for him if the injunction does not issue, which means that he will have “no adequate remedy at law” to repair the harm done, and that he has “some likelihood of succeeding on the merits” when the case goes to trial.<sup>220</sup> In this case the district judge found that the plaintiff would probably go out of business if the preliminary injunction did not issue, which would certainly meet the irreparable harm test. Posner disputed this finding as a “clear error of fact,” on the principal ground that although half of the plaintiff’s revenues were derived from selling the equipment it had been guaranteed by the agreement the defendant was terminating, the judge was mistaken in estimating that its sales from the foreign manufacturer would not increase in the future.<sup>221</sup> “This is unrealistic,” Posner claimed. “Surely Roland [the plaintiff] expects to do better in its second and subsequent years [of the agreement with the foreign manufacturer]. In sum, the loss of the distributorship will be painful, but it will not be fatal.”<sup>222</sup> Yet this is pure speculation by an appellate judge; if this is a “clear error of fact,” it is difficult to see what could not be argued to be.

Posner also found that there was an error of law made by the district judge’s attempt to fashion the remedy in such a way as to avoid harming the defendant. The defendant had argued that if the injunction issued, it would be harmed because the plaintiff would start to phase its equipment out of the plaintiff’s business while the defendant’s hands were tied by the injunction. The judge addressed this concern by requiring that the plaintiff, “within normal economic fluctuations [maintain], the approximate market share which it now has obtained for Dresser products.”<sup>223</sup> Posner held that this condition involved an error of law because the the district judge “failed to consider the possible impact on competition of the injunction that freezes Dresser’s market share until the end of the lawsuit.”<sup>224</sup> Yet, as Judge Swygert noted in dissent, Posner simply ignored the component of the district judge’s decree which permitted the defendant to obtain additional distributors in the plaintiff’s territory, as well as the explicit finding of fact below “that there was no evidence to support Dresser’s contention that Roland would cease or had ceased vigorously to market Dresser Products.”<sup>225</sup> “The alleged error of law concerning the anticompetitive effects of the preliminary injunction,” he continued, “goes only to the question of the appropriate scope of the decree, not whether or not it should issue.” In short, Posner simply substituted his judgment for the district court’s.<sup>226</sup> In fact, even if Posner was correct that the judge had failed to consider the anticompetitive effects of his decree, the injunction should not have been vacated; it should have been remanded for a determination of those effects (a question of fact) and, if appropriate, modification of the decree.

Posner took the position, additionally, that the plaintiff had not made sufficient showing of likelihood of succeeding on the merits, in opposition to the district judge

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220. *Id.* at 386–87.

221. *Id.* at 391–92.

222. *Id.* at 391.

223. *Id.* at 382.

224. *Id.* at 392.

225. *Id.* at 401–02.

226. *Id.* at 402.

and to dissenting Judge Swygert. To prevail in a claim under Section 3 of the Clayton Act<sup>227</sup> a plaintiff has to show both that there was an agreement (which may not have been explicit) and that the agreement was likely to have a substantial (though not necessarily immediate) anticompetitive effect. Despite the fact that the Clayton Act specifically provides that the agreement need not be explicit, Posner held that there was no agreement because there was no "meeting of the minds" (a fiction which is not observed in many areas of contract law), and which has explicitly been repudiated by the Supreme Court in the antitrust context. In *Standard Oil Co. v. United States*<sup>228</sup> the Court construed the broad language of Section 1 of the Sherman Act as intended to protect commerce from all constraints, "old or new." In *Copperweld Corp. v. Independence Tube Corp.*, Justice Stevens, writing in dissent, noted that this broad interpretation has justified the Court's refusal, over time, "to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to satisfy the statutory language."<sup>229</sup> Posner's "meeting of the minds" requirement has no basis in the statute and is in direct contradiction with the prevailing interpretation of it by the Supreme Court. More importantly, Posner held in *Roland Machinery* that the exclusive dealership arrangement did not necessarily have anticompetitive effects. Here we see Posner's restrictive antitrust theory at work in practice. He begins by noting that the exclusion of one or several competitors is not ipso facto unreasonable, for although the "welfare" of the particular competitor may be damaged, this is not the concern of the federal antitrust laws which are concerned with the health of competitive process itself, and the Supreme Court opinion in *Copperweld Corp. v. Independence Tube Corp.* is cited as authority in this regard.<sup>230</sup> It is true that the Court there affirmed its view that the "antitrust laws . . . were enacted for the protection of *competition*, not *competitors*"<sup>231</sup> but this evades the issue in at least two different ways. First, the court below had heard evidence on the question of anticompetitive effect, and found that there was sufficient likelihood of it for the injunction to issue. Second, the way in which the antitrust laws protect competition is by protecting competitors; if protecting the competitive process was their *exclusive* purpose it is hard to see why damages would be retained as the appropriate remedy in antitrust cases, rather than fines for example. No doubt the "economic" justification for this is that it is more efficient to enforce this law in a private law context, but if *that* is the case Posner cannot simultaneously argue that market power which harms individual competitors does not harm competition. This aside, Posner gives his dictum operational focus by claiming that the plaintiff in such an action must prove at least two things: first, that it is likely to keep at least one significant competitor of the defendant from doing business in the relevant market, and second, that the probable effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition. "[H]e must show in other

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227. 15 U.S.C. § 14 (1914).

228. 221 U.S. 1, 59-60 (1910).

229. 467 U.S. 752 (1984) (citations omitted).

230. *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 394. (7th Cir. 1984).

231. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it."<sup>232</sup>

This reflects, again, the neoclassical theory of monopoly, which Posner has elsewhere explicitly embraced and reified as "the" theory of monopoly,<sup>233</sup> in terms of which high concentration indices and even monopolies in some industries can be argued to be efficient, but there are of course alternative theories.<sup>234</sup> For Posner to claim that a version of his theory is now embraced by a majority on the Supreme Court does not in itself establish that it is economically rational. In fact, in the very Supreme Court decision which Posner cites, in which the Court broke with precedent and endorsed vertical integration by holding that a parent corporation and a wholly owned subsidiary are legally incapable of conspiring with one another within the meaning of Section 1 of the Sherman Act, three dissenting justices explicitly embraced the administered pricing theory of monopoly, in terms of which the key variable is not collusion, but market power. "As an economic matter," wrote Justice Stevens (with Brennan and Marshall concurring) "what is critical [for violation of the Act] is the presence of market power, rather than plurality of actors. From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms who have acquired the equivalent amount of market power through an agreement not to compete."<sup>235</sup> These two arguments turn on different theories of the price mechanisms in monopolistic markets, and while the neoclassical theory may currently be endorsed by a majority on the Supreme Court, this in no way entails either that it embodies the purpose of the Sherman Act (which is difficult to believe, given its sweeping language), or that it is the self-evident economic truth. In *Roland Machinery* Posner exploits the heavy burden that the neo-classical theory places on the plaintiff by finding that he has not met either component of his two-part test. Posner is unconvinced by the record that the Japanese manufacturer will in fact be kept out of the market,<sup>236</sup> although as Judge Swygert notes in dissent Posner entirely ignores the evidence before and findings of the district judge on this question.<sup>237</sup> Indeed, Posner does not even claim that there was error of any kind, on this point, and since the criterion is supposed (by Posner's own account) to exclude substitution of its own judgment by the appellate court for the district judge's finding, this is indefensible. For it is clear that this is exactly what Posner is here doing. How else can we interpret Posner's speculations that "[t]he likeliest consequence of our dissolving the preliminary injunction would be to accelerate Komatsu's [the Japanese manufacturer's] efforts to promote its brand

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232. 749 F.2d at 394.

233. POSNER, ANTITRUST LAW, *supra* note 208, at 237-55.

234. For accounts of the findings of many different empirical studies on the effects of concentration on competition see CONCENTRATION AND COMPETITION POLICY, Report of the Committee of Experts on Restrictive Business Practices, Organization for Economic Cooperation and Development (1979); for theories of administered pricing that are alternatives to the neoclassical theory (and some discussion of evidence) see Means, *Simultaneous Inflation and Unemployment: A Challenge to Theory and Policy*, CHALLENGE, Sept.-Oct. 1975, at 6-20; Carlo, *Inflation*, 7 THEORY & Soc'y 398 (1979); H. SHERMAN, STAGFLATION: A RADICAL THEORY OF UNEMPLOYMENT AND INFLATION, (1976).

235. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 789-90 (1984).

236. *Roland Mach. v. Dresser Indus.*, 749 F.2d 380, 394 (7th Cir. 1984).

237. *Id.* at 400.

through the Roland dealership"?<sup>238</sup> Even Posner is here forced to admit that "this analysis may exaggerate the smoothness with which the competitive process operates,"<sup>239</sup> but enough has by now been said to show that he employs a contentious and restrictive theory of monopoly to overturn district court decisions. He seems unable to distinguish neoclassical models from reality, and this enables him to ignore evidence or arguments which are at variance with his beliefs. In this connection Leff was right to point out that there is an irreducible nominalist component to Posner's view.<sup>240</sup>

On the procedural questions, too, we have seen that Posner does not adhere consistently to the traditional principles of deference which his microeconomic and macroeconomic theories of judicial efficiency require him, for different reasons, to do. As a judge he has violated these principles too often, with results that are too one-sided, to make credible the claim that he adheres consistently to his theory in practice, or that he is not "result-oriented" as a judge in precisely the sense in which he objects to this in the writings of Professor Tushnet.<sup>241</sup>

#### IV. IDEOLOGICAL IMPLICATIONS OF POSNER'S VIEW

One of Holmes's most frequently repeated aphorisms is his remark, in dissent in *Lochner v. New York*,<sup>242</sup> that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."<sup>243</sup> The antipathy for substantive due process it reflected revealed what is often held up as an admirable even-handedness, particularly in the economic areas of private law.<sup>244</sup> It can and has been shown that Holmes was not entirely consistent in this regard; that in some of his Commerce Clause decisions, for instance, he appealed to substantive economic theories;<sup>245</sup> that his refusal to employ antitrust legislation against trade unions was at least made easier for him by his belief that as forms of economic organization they would be bound to fail;<sup>246</sup> and that when Congress enacted legislation comfortable to his prejudices, at times he rushed to judgment with evident rhetorical glee.<sup>247</sup> Indeed, establishing that the common law evolved, increasingly, during the nineteenth century, to facilitate the consolidation of American capitalism has been something of a research agenda for critical legal historians; they have sought to show that the neutral language of the law adapted and developed itself to the changing needs of capitalism. And their critics have sought to dispute these claims, at least in part.<sup>248</sup>

238. *Id.* at 394.

239. *Id.*

240. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 469-77 (1974).

241. POSNER, *THE FEDERAL COURTS*, *supra* note 5, at 218-19.

242. 198 U.S. 45 (1905).

243. *Id.* at 74 (1905).

244. For examples of Holmes' dissents in labor cases see *Vegeahn v. Guntner*, 167 Mass. 92, 104, 44 N.E. 1077, 1079-80 (1896); *Plant v. Woods*, 176 Mass. 492, 504, 57 N.E. 1011, 1015-16 (1900); *Adair v. United States*, 208 U.S. 161, 190 (1908); *Coppage v. Kansas*, 236 U.S. 1, 28 (1915).

245. See M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 135, 148, 241 (1943).

246. *Id.* at 119.

247. See, e.g., Duziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986) (for an analysis of the rhetorical structure of Holmes' decision in *Buck v. Bell*, in the context of his commitment to the policies of the eugenics movement).

248. See, e.g., H. SCHEIBER, *NOMOS XXIV, ETHICS, ECONOMICS, AND THE LAW* (J. Pennock & J. Chapman eds. 1982).

What is as ironic as it is astonishing about Posner's theory of wealth-maximization is that he turns this highly controversial thesis into an axiom; he grants what the critical legal historians have been slaving to establish for decades, and then naively proceeds to try to reify it as a timeless "scientific" truth. This is done in many different ways as I have shown, in his writings on the microeconomics of wealth-maximization, in his analysis of the overload problems of the federal courts, in his theory of adjudication and in his practice as a judge. In all these areas, at every turn Posner presents controversial and contentious empirical economic theories as part of "the" theory of wealth-maximization. In his microeconomic discussion, he employed this procedure to legitimate an arbitrary commitment to "shadowing" the market in the allocation of property rights and their externalities so as to promote wealth-maximization, without reference to distributive consequences, and by simply asserting the truth of a trickle-down causal theory in terms of which this could be alleged to function in "society's" interest. In his analysis of the overload in the federal courts, Posner employed the demand/supply model when it suited him, but he quite arbitrarily switched it off (without acknowledging this) and asserted without argument that the level of demand for federal judicial resources is too high, so that they should be made more expensive for litigants. Upon examining Posner's trumpeted assertions that economic analysis plays an important role in such areas as the *Mathews v. Eldridge* test and the first amendment, I explained that this was much ado about nothing, since most of the difficult issues which divide courts in both these areas either could not be resolved by economic analysis, or there were competing solutions, consistent with different and competing economic theories. After surveying Posner's policy recommendations for judges and legislatures for making the courts function more effectively, we found a list of ad hoc suggestions for husbanding judicial resources which were not derived from his economic theory and which are inconsistent with it. And when I looked at his activities as a judge, I showed that he failed to adhere to his ad hoc policy recommendations for various kinds of judicial restraint, or to traditional principles of judicial restraint that might have been thought to be entailed by his "micro" theory of judicial efficiency. Instead, Posner adheres to principles of judicial restraint as and when it suits him, and he happily violates these to advance his own particular neoclassical conceptions of the economics of labor and antitrust law. All along, Posner presents these economic theories as uncontroversially scientific when in fact they are anything but that, and he hides from their inegalitarian distributive implications by pretending that they are mere "by-products" of his scientific theory of allocation. But once it is shown that the theory of allocation is no more scientific than is the assertion that if you take my assets and could pay me for them but do not, we would both be better off, the extent to which "law and economics" is, in this context, nothing more than thinly veiled ideology to legitimate the inequalities wrought by market systems is undeniable. The amazing thing is that these arguments can have so much influence among lawyers when they were thoroughly discredited by welfare economists over thirty years ago. That, one supposes, is eloquent testimony to the staying power of an intellectually bankrupt but dominant ideology.